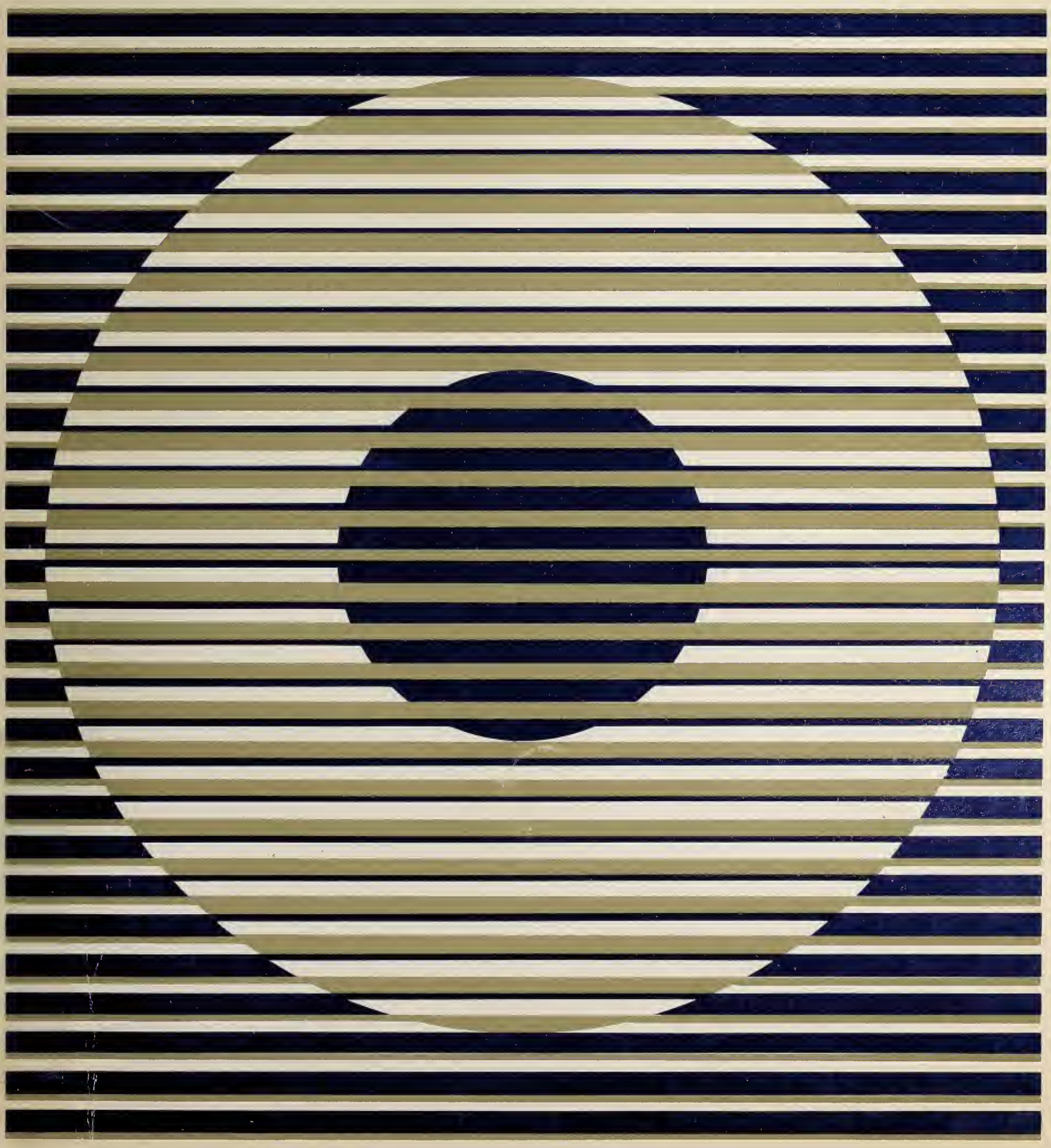
Reforming Planning in Ontario:
Strengthening the Municipal Role

J. Bossons

Discussion Paper Series



Reforming Planning in Ontario:
Strengthening the Municipal Role

Ontario
Economic
Council

J. Bossons

With contributions by
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Discussion Paper Series

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This study reflects the views of the author and not necessarily those of the Ontario Economic Council.

Preface

The nature of the municipal planning process and of the institutional structure in which political decisions on land use controls are made has important implications for urban and regional development, for the perceived quality of the environment, and for stability of employment in an important sector of the provincial economy. Moreover, changes in land values caused by political decisions can result in significant redistributions of wealth. Any proposed changes in the institutional structure of the planning process should therefore be examined closely.

Such proposals have recently been made by the Report of the Planning Act Review Committee (the Comay Report) and by the Report of the Royal Commission on Metropolitan Toronto (the Robarts Commission), which call for a substantial restructuring of the planning process. This report reviews those recommendations.

In writing this report, I am indebted to numerous individuals with whom the issues have been discussed. I am particularly indebted to Stan Makuch, whose contributions have extended beyond prolonged discussion to include preparation of some material used here, and to David Goyette. The extent of their assistance is acknowledged on the title page; without their help this report would be much lessened in value. I wish to thank Dennis Barker, Howard Cohen, and Don Richmond for their contributions; though their views do not always coincide with the positions expressed here, their advice has improved the statement of those positions. I am also indebted to Richard Gilbert, Juanne Hemsol, and Dale Munro for some perceptive suggestions in earlier discussions.

An earlier version of this report was presented to a semi-

nar organized by the Ontario Economic Council. I am grateful to the participants in that seminar for their comments, and particularly to Ken Cameron, Eli Comay, Max Bacon, David Nowlan, and Jeffrey Stutz for their assistance in subsequent discussions. I wish to thank Ian Binnie, Q.C., and David Greenspan, Q.C., for their comments, and also Grant Reuber, Stefan Dupré, and Douglas Hartle for reviewing a draft. Subsequent drafts have been reviewed by David Goyette and Stan Makuch and were considerably improved by their observations. Chapter 7 on regional planning has also benefited from the comments of Larry Bourne and Don Richmond.

While I alone am responsible for the conclusions presented in this report, they have been significantly affected by the contributions and suggestions made by the commentators. On the subject of municipal planning there has been no shortage of controversy, and I have therefore tried to deal with the concerns underlying all points of view. In that regard the reviewers have been of invaluable assistance. A number of briefs submitted to the government commenting on the Comay Report have also been of considerable value.

While it is impossible to satisfy all the concerns raised in response to the Comay and Robarts reports, I have attempted to draw out their common bases and recommend modifications accordingly; here again reviewers' comments have been extremely helpful.

The readability of this report has been greatly enhanced by the editorial contributions of Larry MacDonald and Charlotte Stevenson; readers and author both have reason to be grateful.

J.B.

Toronto
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Chapter 1

Introduction

Land use planning in Ontario has operated within an institutional structure that has not evolved much since it was established by the 1946 Planning Act. If that structure had not been generally satisfactory it would not have endured for three decades. Nevertheless, any policy or plan--and any planning or policy-making process--should be subject to periodic review. In the case of planning, a number of changes in the political environment have made the 1946 structure no longer adequate. These changes include a growing demand for land use controls, motivated by increasing concerns for the environment. The tensions and political pressures caused by the conflict between these concerns and social needs for new housing and for continued expansion of urban areas have put significant stress on the planning process. Increasing regulatory costs, approval delays, more contentious site-specific controls, more frequent appeals to the Ontario Municipal Board and the provincial cabinet, and other symptoms of this stress have made it clear that the planning process needs an overhaul.

The symptoms of stress have resulted in a number of reviews of the planning process, beginning with the Milner reports of 1967-71(1) and including an Ontario Economic Council study in 1973.(2) The effect of increasing approval costs and

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1 Milner, *Tentative Proposals for Reform of the Ontario Law Relating to Community Planning and Land Use Controls*, Ontario Law Reform Commission (henceforth "OLRC"), 1967; Milner, *Development Control: Some Less Tentative Proposals*, OLRC, 1969; OLRC, *Report on Development Control*, 1971.

2 Bacon, Bousfield, Comay, et al., *Subject to Approval: A Review of Municipal Planning in Ontario*, Ontario Economic Council, 1973.

delays on the availability and supply price of housing were also underlined by the report of the provincial Housing Task Force.(3) These and other earlier reviews, together with subsequent government action, are summarized in the first chapter of the Comay Report.

Calls for a comprehensive government review of the planning process had been made by the Ontario Law Reform Commissions's 1971 report and by the 1972 report of the Legislature's Select Committee on the Ontario Municipal Board. On receiving the 1973 Ontario Economic Council report, therefore, the government announced that it would undertake such an appraisal and established the Planning Act Review Committee to carry out this task. The Committee, composed of Eli Comay (chairman), Earl Berger, and Eric Hardy, reported in April 1977.(4)

Meanwhile, a comprehensive review of the political and institutional structure of the government of Metropolitan Toronto was being undertaken by the Royal Commission on Metropolitan Toronto, with the Hon. John Robarts appointed as commissioner. The report of the Robarts Commission, submitted in June 1977, recommended changes in the planning structure in the two tiers of the Metropolitan Toronto government.(5)

This report analyses the planning process, reviews the recommendations of the Comay committee and the Robarts commission, and proposes further improvements. As background

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3 *Report of the Advisory Task Force on Housing*, 1973.

4 *Report of the Planning Act Review Committee*, 1977. Five studies commissioned by the committee were also published: Bricker, "Planning Issues: The Public Consultation Program"; Carson and McNabb, "Operation of Municipal Planning"; Lang and Armour, "Municipal Planning and the Natural Environment"; John Bousfield and Associates, "Citizen Participation in the Preparation of Municipal Plans"; and Hodge, "Planning for Small Communities".

5 *Report of the Royal Commission on Metropolitan Toronto*, 2 vols, 1977. Fourteen supplementary studies were published by the Commission, of which three are particularly relevant to a review of the planning process: John Bousfield Associates and Comay Planning Consultants Ltd, "The Planning Process in Metropolitan Toronto"; Powell, Cameron, et al., "Political Life in Metropolitan Toronto"; and Jaffary and Makuch, "Local Decision-making and Administration".

for a discussion of the proposals of the Comay and Robarts reports, some of the essential issues in the planning process are discussed in the first three sections of this chapter. These deal with objectives of regulatory reform, conflicts among these objectives, and tools used in current land use regulation. The conclusions and proposals of the Comay and Robarts reports are then summarized in Section 1.4. An overview of the contents of this report is provided in a final section.

1.1 SOME KEY CONCERNS AND OBJECTIVES

Planning as a subject is important, intangible, and subtle. It is clearly desirable to have "good planning" but difficult to determine what that means in operational terms. It is an intensely political matter, reflecting subjective values. Because of this, any discussion of municipal planning must concentrate primarily on the process by which planning decisions are made or delegated. The objectives of reform must be translated into implications for the operation of the planning and regulatory process.

Such concerns, for the most part common to all regulatory processes, include increasing political accountability for regulatory decisions, protecting individual rights affected by regulation, recognizing the need for predictable regulatory decisions, and increasing the efficiency of regulation.(6) The objectives are not all consistent, however, and it is necessary also to recognize conflicts between them in the development of reform proposals.

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6 For a useful general survey of the reasons for regulation, the interests of participants in the process, and the consequent problems of defining regulatory objectives, see Trebilcock, Waverman, and Prichard, "Markets for Regulation: Implications for Performance Standards and Institutional Design", in *Government Regulation: Issues and Alternatives*, Ontario Economic Council, 1978, 11-66.

Municipal accountability

Most observers of the municipal planning system in Ontario agree that its major flaw is the excessive degree of provincial intervention in municipal planning decisions. Such intervention, by reducing the accountability of municipal councils, has had insidious effects on municipal government. As one observer has commented: "Much municipal irresponsibility today can be attributed to the planning system itself; the system not only allows but encourages less than responsible behaviour."(7) Responsible decision-making is discouraged by allotting final responsibility for most planning and regulatory decisions to an appointed provincial body, the Ontario Municipal Board, subject only to appeals to the provincial cabinet. Accountability for decisions is thus diffused over two levels of government.

Restrictions on municipal authority, which are pervasive and not confined to planning, have generally reduced the effectiveness of municipal government. As the Robarts Report has commented: "Democratic political institutions ... are created to enable people to govern themselves. If government is incapable of acting responsively and effectively, it is impotent, and democracy cannot be said to exist ... There are several constraints on local governments ... that lessen its ability to act effectively and independently. (These include) the extent of provincial statutory and regulatory controls over local government activities."(8) For this reason, a key element in the set of reforms recommended by the Robarts commission was the transfer of responsibilities from the province to municipalities:

> The chapters of [the Robarts] report dealing with the social services, planning, and transportation describe the changes that are required to remove many of the trivial provincial

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7 Bureau of Municipal Research, "Changing the Planning Act: Risks and Responsibilities", *Topic No. 3* (November 1977), 8.

8 *Report of the Royal Commission on Metropolitan Toronto*, Vol. 1, 1977, 34-5.

controls over local administration of these services. But the most important area of change is the redefinition of the role of the Ontario Municipal Board in the fields of finance and planning. In Chapter 10 recommendations are made which will ensure the continuation of the Board's responsibility to supervise local borrowing and capital budgeting, while removing much of the double-checking and administrative complexity which now unduly delay municipal projects in Metropolitan Toronto. In the land-use planning field, recommendations are made in Chapter 11 to limit the role of the Ontario Municipal Board as it affects municipal planning in Metropolitan Toronto.(9)

As is widely recognized, there are a number of historical reasons for the trend to increased provincial intervention in municipal affairs in recent decades. With accelerating urbanization and a fragmented municipal government structure ill-equipped to deal with its regional effects, increased provincial intervention has (in the short run) been an efficient means of responding to planning problems. Nevertheless, the long-run effects of such intervention have been further to reduce the ability of the planning system to deal with planning issues. As summarized by the Comay Report (paragraph 3.9), "With divided powers, fragmented authority, and diffused responsibility has emerged a system of considerable complexity ... It is a system with an inherent potential for delay and high built-in costs ... Municipal planning ... is a system difficult for the uninitiated to penetrate. Affected interests--public and private, large and small, of broad or narrow significance--are to a large extent in the hands of the expertise and skill of the system's practitioners." The present planning system is ineffective and impenetrable for many citizens. The institutional structure of the planning process is of primary benefit chiefly to those practitioners--municipal lawyers and professional planners--whose importance is enhanced by its complexity.

Increasing the decision-making authority of municipal councils would clarify the operation of the planning system and

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9 Ibid., 46-7.

increase political accountability for regulatory actions. In doing so, it would potentially simplify the operation of the planning system.

Individual rights

Recent years have seen increasing participation by citizens in municipal planning decisions, quickened by the discovery in the 1960s that neighbourhoods thought to be stable by their residents could be rezoned for large-scale developments without affected individuals being aware of such impending decisions. Under the present Planning Act, the only requirement for notice to affected parties is that they be informed of a council's intention to apply to the Ontario Municipal Board for approval of a zoning bylaw passed by the council. As an earlier Ontario Economic Council review commented, "The silence of Section 35 of the Planning Act on the question of public participation in the municipal zoning decisional process is obviously unsatisfactory."(10) This unsatisfactory silence remains.

The Ontario Municipal Board currently has the authority to make final decisions on any planning issues in which affected interests are in conflict, subject only to appeals to the provincial cabinet. Any affected party (developer or neighbour) who opposes a municipal council's decision may file an objection with the Municipal Board, which must then hold a hearing on the matter and adjudicate between the conflicting interests. Because individual interests will be heard in hearings before the Ontario Municipal Board, it is often assumed that it is only of importance to ensure individual's rights in such hearings. Unfortunately, this assumption neglects two facts. First, the weight given to municipal councils' decisions by the OMB makes it important for individuals to be heard by municipal councils prior to their decisions. Second, the relative

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10 Bacon et al., *Subject to Approval*, 116.

inability of individuals to defend their interests at the OMB without being represented by counsel effectively precludes most low-income individuals from participation in the decision process once a municipal council has made its decision.

For those able to participate effectively in OMB hearings, the present process does provide important protections. The Board is an independent tribunal with power to modify or reject municipal bylaws. It provides objectors with an opportunity for a detailed hearing of the basis for their objection as well as affording them the ability to cross-examine expert witnesses introduced to defend the municipal action. While the Board's powers interfere with municipal authority and accountability, the protection provided to individual rights must in some manner be maintained.

Predictability

Much of the controversy and confrontation that occurred in urban municipalities in Ontario in the late 1960s and early 1970s resulted from citizens' discovering that neighbourhoods they assumed to be stable could by a quiet council decision be opened to large-scale redevelopment. Zoning bylaws had been widely assumed to ensure stability, and the discovery that rezoning could occur gave a significant impetus to the organization of citizen reform movements in many Ontario municipalities. Predictability and the avoidance of uncertainty are of key significance to many residents.

For the development industry, predictability is of equal importance. The fact that municipal planning policies may be frustrated by residents' and ratepayers' objections increases uncertainty and makes initial investment funds more difficult to obtain. The fact that residents' groups have now been conditioned by the experience of the past decade to regard any rezoning as "the thin edge of the wedge" has made all rezoning more difficult. Moreover, the widespread downzonings that resulted from the citizens' reform movements in the early 1970s caused capital losses for speculators, and engendered additional uncertainty.

The changes in municipal policies that occurred in the early 1970s were the result of a general change in social values too. Nevertheless, the impact of the change in values would likely have been less had the planning process afforded clearer protection. As a review at the time noted, "It must be acknowledged, of course, that a great deal of dissatisfaction stems from the actual land use decisions, not the means employed in the process ... However, it is not too much to speculate that, had the integrity of zoning been preserved in the original land use protection role for which it had so vigorously been 'sold' in the first place, a great deal of the fear and misunderstanding that now attends public participation in the planning process might have been averted."(11) In any reform of the planning process, therefore, reducing uncertainty must be given high priority as an objective. Greater certainty about both planning policies and the planning process would help reduce unnecessary conflict and increase regulatory efficiency.

Regulatory efficiency

Reducing costs and delays caused by the regulatory process is obviously a primary objective. Such costs have often been criticized.(12) However, the key concern is to avoid unnecessary costs. It is easy enough to say that regulatory costs should be reduced, but much more difficult to say how to do so without diminishing regulatory effectiveness.

Obviously the social benefits derived from regulations must be weighed against their economic costs. It is also necessary to recognize that such a tradeoff has in fact been made by politicians, so that the current regulatory system reflects some awareness of regulatory costs as well as benefits.

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11 Bacon et al., *Subject to Approval*, 77.

12 See for example the criticism of delays in the subdivision approval process in *The Process of Public Decision-Making*, Ontario Economic Council, 1977.

Improving efficiency means finding ways by which regulatory objectives may be attained more easily. Significant costs and delays are made probable by the fact that the objectives are in conflict. The resolution of conflict requires checks and balances in the planning process which add complexity and increase costs. The challenge is to find ways to simplify and expedite the regulatory process without undercutting the checks and balances necessary for the resolution of conflicts. Essentially it is a question of changing the structure of planning and regulation so that checks and balances will be more efficient.

1.2 CONFLICTS BETWEEN OBJECTIVES

There are many conflicting interests in most municipal planning issues, and it perhaps should not be surprising that the municipal planning system is consequently complex. This complexity is itself a problem, both for a citizen affected by some planning issue and for the analyst trying to develop improvements. It is obviously desirable to simplify the current planning system and make it more comprehensible. This section describes some of the conflicting objectives and interests that must be dealt with in any attempt to reform the planning system.

Political choice vs technical expertise

Basic to the quality of regulatory decisions is the role of technical advice. There is an inherent conflict between the technical competence of regulatory decisions and the political element in such decisions. Much of the existing land use planning system is based on the questionable assumption that technical planning considerations should be given primacy and planning decisions should therefore be insulated as much as

possible from politics.(13) By contrast, the Comay and Robarts proposals are based on the opposite assumption: that land use planning is a highly significant aspect of municipal public choice and hence must be regarded as primarily a political decision.

The partial insulation of the planning process from politics has impeded the adjustment of municipal planning policies to reflect changed public perceptions, and in doing so has increased the social costs of changing policies. Nevertheless, there is some merit in a technocratic argument, as evidenced by the weight it has traditionally been accorded. Moreover, the vested interests in the technocratic approach imply political opposition to the implementation of the Comay and Robarts proposals.

A fundamental obstacle in any attempt to reform a regulatory process is the vested interests of lawyers and other professionals active in the process. Any existing regulatory process creates wealth for professionals, who build up human capital useful only in that specific process, and any reform necessarily destroys part of this human capital. The result is opposition from professionals whose interests are threatened.

Futhermore, to the development industry the current regulatory process, for all its faults, is at least known. Moreover, to the extent that regulatory decisions are now based on administrative precedent or technically-determined planning criteria, they are more predictable than political decisions by municipal councils. The development industry has therefore a joint interest with lawyers and other planning professionals in maintaining adjudicative procedures which amplify the importance of technical planning advice. The industry's interest in making the regulatory process more efficient is thus balanced by an even stronger interest in avoiding uncertainty.

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13 Or at least from municipal politics. The role of planning boards and of official plans, as well as the role of the Municipal Board, may all be seen as attempts to minimize the role of municipal councils in planning actions.

The confluence of professional self-interest with industry concerns about predictable regulation means that such views cannot be dismissed even from an analytic (let alone a political) standpoint. Minimizing social costs induced by uncertainty must be a primary concern, and the current role of technical planning advice is a source of predictability.

Provincial decision-makers will obviously wish to try to modify reforms to reduce their impact on these vested interests while not materially affecting the attainment of the reform objectives. To the extent that modifications of the planning system make regulatory decisions more predictable, some of the negative impacts on vested interests will be ameliorated. A number of modifications of the Comay proposals that would have this effect are proposed below. Nevertheless, the basic conflict between technocracy and municipal democracy remains.

Adjudicating private rights

The current role of the Ontario Municipal Board as a "non-political" adjudicative body is strongly rooted in the notion that property rights should not be changed without a quasi-judicial evaluation of the merits of arguments for and against the change. It is of course equally strongly in conflict with the notion that citizens should, through their votes, be able to determine the policies and future of the municipality in which they live. Elected municipal councils merely recommend planning actions to the Board. The Board may accept, reject, or modify municipal recommendations; further, it may, on petition by a developer, even make decisions in the absence of a municipal recommendation.

The present role of the OMB emphasizes protection of individual rights, although on the not-always-accurate assumption that a highly legalized procedure will provide such protection. It has also served incidentally to magnify the role

of expertise as a rationale for "non-political" adjudication of planning issues.(14)

Ontario is unique among Canadian provinces in the extent to which authority for municipal decisions has been taken away from municipal councils and assigned to an appointed body. The Comay Report commented (paragraph 10.4) as follows: "We think it is wrong that in approving municipal decisions the Board is frequently called on to substitute its own judgement for the judgement of elected municipal councils or the Minister." Since "judgement" is frequently a matter of reconciling conflicting values and competing objectives, it is difficult to justify the fact that in the present planning system such highly political choices are made by appointed provincial officials.

Nevertheless, it is important also to emphasize the need for a review of municipal decisions that affect individual property rights. Land often accounts for a major portion of an individual's wealth, which can thus be significantly reduced by the actions by a municipal council. Simply to ensure that such decisions are not arbitrary is reason for provincial review. That this cannot be done without compromising the ability of voters to determine municipal policies through their elected councils creates an unavoidable conflict.

Accountability vs predictability

The complexity of the current planning system has reduced political accountability for municipal planning decisions. By increasing the effective authority of municipal councils, the planning process would be simplified and the responsibility for planning decisions more clearly focused. This would make planning more comprehensible to the public and more responsive to citizens' concerns. But while increasing political

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14 As noted elsewhere, this rationale is a curious blend of U.S. liberal New Deal ideology, with its reliance on the "expert" as a source of objective solutions, and the legal tradition of due process. See Trebilcock et al., "Markets for Regulation", 42-7.

accountability for local planning decisions, it could lead to less predictability by removing restrictions that have had the incidental effect of building in inertia.

As already noted, predictability is important not only to the development industry but also to residents and other owners of neighbourhood property. If the authority of municipal councils and therefore political accountability are increased, reducing regulatory predictability, something further is needed to prevent greater uncertainty in land use regulation.

Conflicts between governments

The effects of land use decisions are not limited by municipal boundaries. They affect neighbouring municipalities, the attainability of regional planning objectives, and other matters which may be of provincial concern. Potential conflicts thus exist between adjacent municipalities, between local and regional governments, or between a municipality and the provincial government, and because these opposing interests are real the planning authority at the municipal level cannot be unlimited.

1.3 THE RELATIONSHIP BETWEEN PLANNING AND REGULATION

Land use planning broadly encompasses both policy-formation and regulation. Policy formation is currently accomplished through the formulation of comprehensive official land use plans for a planning area. Regulation is achieved through the use of municipal zoning bylaws, subdivision approvals, and other forms of development control. Such regulation is also indirectly effected through municipal decisions on public works and the provision of municipal services. In the current system, the relationship between policies and regulations is not clear-cut, in part reflecting the fact that municipal land use regulation antedates the introduction of official plans as legal planning instruments.

There has gradually developed a hierarchy of planning and regulatory instruments. The planning instruments include regional official plans adopted by upper-tier municipalities, general official plans adopted by local municipalities, and district official plans for local areas adopted by local municipalities. It was once fashionable to favour a strict hierarchy of such official plans, with the province adopting a provincial plan to which all regional (and lower-level) plans would be required to conform.(15) While formal provincial planning is a remote possibility (except for special environmental purposes such as the Niagara Escarpment plan), the potential for creating a hierarchy of plans provides an institutional means by which inter-governmental conflicts may be more efficiently resolved.

To do so it is of course necessary to ensure that what is done by a municipality (whether through public works, regulatory decisions, or other actions) is consistent with the policies adopted in municipal plans. This implies a further hierarchical relationship between planning policies and municipal actions.

While the relationship between planning policies and implementing actions is not comprehensively defined in the current system, the Planning Act does specify a number of ways in which municipal actions must conform to policies adopted in municipal official plans. Increasing the comprehensiveness of requirements for consistency between municipal actions and municipal plans would permit intergovernmental disputes to be resolved more efficiently.

This report will emphasize the efficiency to be gained by strengthening and utilizing a hierarchical structure of planning and regulating instruments. In addition to facilitating the resolution of intermunicipal conflicts, a hierarchical structure may also be used to increase regulatory certainty for residents and property owners.

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15 The recommendations in the 1973 Ontario Economic Council study are an example. See Bacon et al., *Subject to Approval*, 97-101, 106-11.

1.4 THE COMAY AND ROBARTS PROPOSALS

Both the Robarts Report and the Comay Report propose significant changes to the planning process. The proposals differ in particulars; those of the Robarts commission are recommended only in relatively general terms, reflecting its broader orientation towards the entire structure of municipal government, while those in the Comay Report are detailed and numerous. But the two reports agree in their general thrust. Their major aim is to reduce the complexity of the system by increasing municipal authority. To achieve this, the following changes are proposed in both reports:

- ¶ Reducing the role of the the province. The reports argue for reducing the role of the province to the minimum required to achieve provincial interests and protect individual rights. They recommend elimination of the current requirement for provincial approval of all local planning actions (no matter how local in interest) and propose simply that the provincial government be empowered to veto or modify municipal decisions which conflict with declared provincial interests.

- ¶ Reducing the role of the Municipal Board. In the view of both reports, the Board should be strictly an appellate body, with its powers reduced in dealing with appeals by individual objectors. The grounds for appeal should also be restricted. The Robarts Report proposes that the OMB be empowered only to hear appeals from affected individuals where the municipality has violated rights of natural justice in its procedures; the Comay Report proposes that grounds for appeal be less restricted.

- ¶ Providing for provincial resolution of intermunicipal disputes. The province should resolve all intermunicipal disputes, including disputes between upper-tier and lower-tier municipalities within a two-tier regional government structure.

- ¶ Clarifying the role of upper-tier municipalities. All regulatory powers should be assigned to local municipalities, with upper-tier municipalities having the right to appeal to the province against lower-tier decisions.

Both reports also propose modifications clarifying rights of citizen participation and encouraging more effective regional planning.

The Comay Report proposes many further changes in the planning and regulatory process. Among the most important of these are the following:

- ¶ Changing the role of official plans. Two somewhat contradictory proposals: requiring the prior adoption of planning policies justifying any regulatory decisions, but on the other hand eliminating the existing requirement that regulatory bylaws and other municipal actions conform to previously adopted official plans.

- ¶ Making reulatory tools more functional. Existing regulatory tools should be made more efficient. So that existing regulatory instruments will not be misapplied towards objectives for which they are ill-fitted, more direct instruments should be developed.

- ¶ Assigning subdivision approval authority to municipalities. There should be more decentralization of approval authority and a concomitant formalization of the "rights" of other agencies now involved in subdivision approval.

- ¶ Restricting conditions on subdivision approval. Municipal ability to impose financial levies and other conditions on subdivision developers should be restricted.

- ¶ Restricting municipal development standards. A number of restrictions should be imposed on the ability of municipalities to set development standards (such as minimum lot sizes) which may have an exclusionary effect.

Besides these proposals, all advanced in considerable detail, the Comay Report makes numerous recommendations for minor or clarifying changes in the planning process.

1.5 OVERVIEW OF THIS REPORT

This report is divided into three parts. In dealing with the proposals made by the Comay committee and by the Robarts commission, it first examines the complexities of the planning problem and the political decisions required in planning. A framework for analysis is thus constructed in the first part which is then used, in the second part, to evaluate the reforms proposed by the two reports. Some defects are found in them, and remedies are suggested. The reforms evaluated or suggested

in the second part are then integrated into an action program in the third part of this report.

A fundamental issue

A major reason for the complexity and fragmented responsibility of the current planning system is that there are significant potential social costs to be expected from unrestricted municipal autonomy. The reasons why unrestricted municipal decision-making authority could often result in decisions ignoring or opposing important social interests are discussed at length in the first part.

Given that is the case, the problem is not simply one of eliminating provincial controls but rather of finding a more efficient tradeoff between restriction and accountability. This might mean imposing restrictions which are "quasi-constitutional" in the sense of defining various procedural rights for affected parties, so that safeguards against inappropriate municipal decisions may be built into the procedures of the system rather than being accomplished by spontaneous intervention by the provincial government. Some of these "quasi-constitutional" restrictions already exist.

The Comay and Robarts reports understate the importance of restrictions on municipal authority, in part because of their (justified) concern to point out the inefficiencies introduced by the currently excessive degree of provincial intervention. As a result, a legitimate objection is that existing restrictions on municipalities provide protections not afforded in their proposals. Greater decision-making authority at the municipal level requires effective alternatives for the protections that currently exist. If such alternatives cannot be established, political appeals for provincial protection will be successful in the long run. Municipal decision-making autonomy will ultimately be feasible only if the resulting municipal decisions are acceptable. For this reason, considerable attention is devoted in the first part to describing the causes of the political demand by citizens for restrictions on municipal autonomy.

A note on terminology

It will be necessary below sometimes to refer to all types of planning decisions collectively and at other times to distinguish between policy decisions and implementing actions. The terms "planning action" and "municipal planning decision" will mean any type of planning decision including implementing actions. Those planning actions which determine policies will be called "planning policy decisions" and will be generally assumed to be specified through the formal adoption of a "planning policy statement". The role of such policy statements in the municipal planning process will be discussed at considerable length throughout this report.

It will also be necessary to differentiate between different types of planning policies adopted by a municipality. "Planning policy statement" will mean any planning policy adopted by a municipality. Certain planning policies apply to the regulation of land uses in an area (including any major public works that significantly affect adjacent land). Where implementing bylaws must conform to previously adopted land use planning policy statements, such statements will be referred to as "official plan statements"; the collection of all such official plan statements enacted by a municipality will be referred to as the municipality's "official plan". Other planning policy statements adopted as guidelines for subsequent municipal decisions (where implementing decisions are required to have regard for adopted policy statements but not to be in strict conformity with them) will be termed "municipal planning statements".

While it is desirable to encourage municipal planning to be comprehensive and take account of potential conflicts between different policies, the comprehensiveness and consistency of a municipality's planning policies may involve either official plans or a set of separately-adopted municipal planning statements, or both together. The terminology used here to differentiate types of planning policy statements focuses on the legal status of such statements rather than on their substantive content.

Implementing decisions may take many forms. Planning actions that implement official plan policies include the enactment of zoning bylaws, the approval of development agreements, the approval of subdivision plans, the granting of minor variances, and the location of public facilities that have a substantial effect on land uses. Planning actions that implement other planning policies include municipal decisions such as the approval of capital budgets, the location of municipal service facilities, and the allocation of operating budgets.

The terminology used in this report draws on that now used in the current planning system and in the Comay Report. However, the different ways in which planning policies may be adopted by different municipalities both at the present time and in the various proposed systems can cause confusion. The terminology described here will help make things clear, with the generic term "planning policy statement" being used to indicate any formally adopted municipal policy regardless of type or legal status.

PART ONE

UNDERLYING ISSUES

"Felix potuit rerum cognoscere causas."
[Fortunate is he who can discern the causes of things.]

--Virgil, Georgics

Reflecting their action-oriented nature, neither the Robarts commission nor the Planning Act Review Committee attempted to delineate the interacting forces in the planning process. And yet the forces underlying the process are at least as complex as the process itself.

A central conclusion of both the Comay Report and the Robarts Report is that municipal authority is too restricted by provincial legislation. The accountability of municipal politicians to local citizens is obscured by provincial intervention, which makes it difficult for voters to determine who is responsible for local decisions. On planning issues, municipal politicians can duck responsibility for decisions, passing blame to the Ontario Municipal Board and the provincial government, with whom actual authority is shared. The sharing of authority occurs both because of a tradition of active provincial intervention in municipal

planning decisions and because of an associated tradition that municipal planning may not be of adequate quality unless there is an opportunity for "objective review" of the technical merits of a municipal planning decision. These two traditions, reinforcing each other, have limited the extent to which planning issues are decided through the local political process.

Of particular importance in both reports is the assumption that planning decisions are and should be political decisions made by majority vote in an elected local council. On the surface, this assumption may seem indisputable. By ensuring that full decision-making authority is vested in local councils, accountability for decisions is clearly focused on the elected councillors. The Robarts Report (p. 35) quotes Alexis de Tocqueville on the advantages of clear accountability inherent in local autonomy: "Without power and independence, a town may contain good subjects, but it can have no active citizens."

Nevertheless, local municipalities in Ontario have historically not been accorded full decision-making authority, and the legal and administrative limitations on local autonomy have reflected widely held beliefs that such restrictions are appropriate. It is therefore useful to examine the basis for such beliefs, if only to analyse why there has been political support for the continued restriction of municipal autonomy.(1) Without an understanding of the traditional restrictions on municipal authority, it is difficult to evaluate proposed changes in municipal government.

The political problems of land use decision-making are discussed in this part. In chapter 2,

the social benefits and costs associated with governmental intervention in the land market are reviewed. In doing so, the social and economic factors underlying political decisions are discussed rather than the process by which such political decisions are made. In chapter 3 the institutional problems affecting decision-making are dealt with. The implications of this analysis are drawn together in chapter 4, in which alternative strategies for modifying the institutional structure of the planning process are described. The conclusions reached in chapter 4 are then applied in Part Two in analysing the specific proposals of the Comay and Robarts reports.

Although the extent to which (and manner in which) restrictions are imposed on a municipal planning authority is a central issue, it is not the only one to which the analysis of this part is relevant. A second key problem is to find more efficient and less expensive techniques of land use control. At the same time, such control instruments must take account of the variety of purposes of government intervention and the difficulty of serving them even with the existing instruments.

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1 *As J.S. Dupré has argued, "Any division of power that a society creates through its political institutions will tend to reflect in part the values of that society ... Forces embedded in the political process tend to make any clear-cut escape from [the current] hyper-fractionalized quasi-subordination [of municipalities] difficult if not impossible". Inter-governmental Finance in Ontario, a study prepared for the Ontario Committee on Taxation (Toronto, 1967) 3-6.*

Chapter 2

Benefits and costs of land use controls

While few individuals would question the need for some government intervention in the land market, the appropriate extent is a subject of considerable debate. This subject is not discussed in the Robarts or Comay reports, in part because they are concerned with the planning process rather than with planning decisions. However, it is useful to begin by reviewing the general question of government intervention in land use.

The benefits and costs of political decisions are often discussed in a static context, and this approach is followed in the first two sections of this chapter. The various reasons for government intervention in the land market are first briefly reviewed. These reasons are broader than the oft-cited rationale of dealing with external effects, and the resulting variety of purposes of land-use controls implies a need for a multiplicity of control instruments. The social costs of intervention in a static context (assuming an unchanging level and form of intervention) are summarized next. But some of the more important social costs of land-use controls arise only in a dynamic context, such as the effect of uncertainty caused by changes in controls. This source of social costs is briefly reviewed in the third section. The final section examines the institutional devices that have been used to reduce that uncertainty by helping maintain consistency in controls over time.

2.1 REASONS FOR CONTROLS

Land-use problems represent a classic example of market failure in economics. A producer emitting pollution into the

air breathed by neighbouring consumers is a classic instance of the fact that, in life, one cannot always assume that the range of alternatives open to a consumer is independent of choices made by other consumers or producers.(1) In a pure market economy, the effect of such air pollution on the consumption choices of neighbouring consumers is not reflected either in the market price of output of the producer or in the costs of inputs purchased for use in production. The reduction in consumption alternatives for neighbours is a social cost of production, outside the range of costs and prices taken into account by the producer. In economics it is typically called an "externality."

If one could assume there were no externalities in land uses, there would be a strong prima facie case for presuming that the most efficient use of land would be generated by a well-functioning private market. Unfortunately, this presumption obviously cannot be made. There are four types of problems that (even in a static context) require government intervention in the land market and ensure that, in the absence of such intervention, the use of land will not be socially optimal. These are local externalities, global externalities, "secondbest" problems caused by restrictions on municipalities' taxing powers, and differences between private and social rates of discount ("market myopia").

Local externalities

A "negative local externality" may be defined as any restriction on consumption or production opportunities of neighbouring households or firms resulting from decisions made by the owner or user of a piece of land. A local externality need not be negative; examples of a positive local externality include the provision of public park or recreation space as

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1 This assumption is one of several postulates required to derive the neoclassical hypothesis that competitive markets achieve efficiency in the maximization of individual satisfactions. Cf. for example Sections 1.3 and 2.2 of Koopmans, "Allocation of Resources and the Price System", *Three Essays on the State of Economic Science* (McGraw-Hill, 1957).

part of a land use development, enhancement of a streetscape, or protection (and renovation) of historical buildings that affect the perceived character of an area.

While local negative externalities can be dealt with theoretically in many ways, the easiest way is simply to control them by direct regulation. Controlling the location of land uses with negative local external effects is the oldest function of zoning bylaws, so-called because they designate restricted areas or "zones" in which uses with negative external effects are permitted to occur.(2)

The practical definition of a local externality is a political matter; it has changed and expanded over the years, reflecting changes in social perceptions. The growing population in urban areas both increased the number of people affected by negative externalities and (perhaps more important) reduced the ease with which such externalities may be avoided. The growing number and average wealth of middle-income households has had an effect because the perceived importance of environmental quality is likely to be an increasing function of household wealth. As the political sophistication of urban households developed, it was coupled with an increased awareness of the extent to which (and methods by which) an individual's range of consumption choices may be protected and/or enlarged through government intervention.

Global externalities

A second reason for governmental intervention in the land market is the existence of "global externalities", changes in the range of choices available to households or producers resulting not from the actions of a single landowner but from the collective actions of all decision-makers. Even with no local externalities, global externalities arise as a result of

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2 The existence of negative local externalities is the classic rationale for zoning bylaws in the urban economics literature. Cf. for example, Davis, "Economic Elements in Municipal Zoning Decisions", *Land Economics* (Nov. 1963).

changes in congestion resulting from increases in the residential population or work force in an area.

A prime example of a global externality is the effect of urban growth and redevelopment on traffic flows. Increased traffic implies three types of social cost: increased capital expenditures aimed at relieving congestion, increased costs of travel (including cost of additional travel time) resulting from congestion, and spillover effects on the quality of residential neighbourhoods (noise, danger to children, etc.) when local roads are used by motorists to avoid congestion on arterial roads. These costs are not the result of decisions regarding land use on particular lots but rather the aggregate effect of all land use decisions in the area. The limitation of such global externalities is one of the primary motivations underlying the land use restrictions introduced in the City of Toronto's new Central Area Plan and reflected in the emerging Official Plan for Metropolitan Toronto.

A number of important examples of global externalities arise at the provincial level, in part because many of the negative externalities resulting from population growth can only be dealt with through policies implemented at a regional level. Increased provincial concern over environmental quality is one example; this concern is enhanced by population growth not only because of the increased pollution caused by a growing population but also because the effects of such pollution become harder to avoid as population increases in a region. The diminution of agricultural land is another example of a global externality now widely perceived to be important.

A global externality means that optimal social policies should include restrictions, penalties, subsidies, other incentives, and/or taxes, whose joint effect is to engender private land use decisions that reflect its social cost.

Limitations on taxing powers

Some of the negative external effects of development may be lessened or ameliorated through capital or ongoing expendi-

tures by governments on parks, transportation, and local improvements. The ability to levy site-specific taxes on developers may allow expenditures on services which remove or offset the negative externalities caused by development. Limitations on the ability to levy such taxes increase the extent to which negative externalities must be controlled through direct regulation.(3)

Beyond this, an important fiscal effect of a new development may be to increase the demand for social services to a greater extent than the net tax revenue of a municipality. In such cases an inability to vary taxes on new developments to provide for varying effects on the aggregate demand for municipally funded services will imply that land use restrictions will (and should) be used to control likely incremental changes in aggregate demand for such services.(4)

The possibility that tax levies on a development may be insufficient to pay for the cost of the services required, including both hard services for the physical development and soft services for the employees or residential population created, is further rationale for the use of land use controls. Unlike the case of pure global externalities, the use of land use controls as a substitute for tax levies is clearly a second-best means of governmental intervention. Nevertheless,

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3 Though primarily an application of standard "second-best" theorems, this rationale is somewhat related to the "fiscal externality" model of B. Hamilton. Cf. Hamilton, "Zoning and Property Taxation in a System of Local Governments", Urban Institute Working Paper 1207-14 (Washington, 1972).

4 In Houston, Texas, a large metropolitan area without a zoning ordinance, the relative unpredictability of the location of large apartment developments has resulted in major capital costs for connecting transit services which are borne by the city. Cf. Siegan, "Non-zoning in Houston", *Journal of Law and Economics* 13 (April 1970) 139. The Houston city attorney has suggested that this has been an important reason for the city's activity (under powers granted by a 1965 Texas statute) in enforcing restrictive covenants incorporated into land titles of virtually all single-family dwellings within the city to preclude alternative uses of the land. By so doing, it hopes to avoid the costs of servicing the additional population which might result if the operation of the market were not constrained by the restrictive covenants. W.A. Olson, cited ibid.

there are numerous constraints on the ability of municipalities to force developers to pay for all the marginal costs of satisfying the additional demand for municipal services generated by a new development, and these constraints make land use controls important as a means of approximating a socially optimal policy. Recent political demands for government intervention to regulate growth in urban areas reflect in part an increasingly widely held perception (whether right or wrong) that additional municipal taxes gained from new development do not match the likely costs of meeting the additional demand for municipal services.(5) Attempts to limit municipal ability to levy site-specific taxes on new developments will thus probably cause increased political pressures for the imposition of additional land-use controls to prevent development.

Market myopia

A fourth reason for urban intervention in the land market, "market myopia", is the general perception that the social rate of discount applicable to the future effects of a development may be lower than the rate of discount applied by the private land market. This rationale for intervention typically applies in conservation problems, such as the Ontario agricultural lands preservation issue, where the time horizon of private developers is perceived to be shorter than what is socially optimal. The relevant measure of the time horizon is a weighted average of the time between present and future effects, where the weights applied to each time duration are

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5 Little empirical work has been done on this question. One widely-quoted recent study (Price Waterhouse, "Cost/Benefit Study of Land Use in the Borough of York", 1971) concluded that the choice between high-density and low-density residential development in the Borough of York had no significant financial impact on the borough (i.e. that marginal tax revenues approximately equalled additional expenditure requirements). However, because this study confined itself to purely local effects and ignored the costs (even to Borough of York taxpayers) of housing elsewhere in Metro that would be required were low-density development to be chosen in York, the results are incomplete.

the discounted present values of the perceived effects; the larger the rate of discount used in calculating present values, the smaller the effective time horizon.

For developers or for other individuals, the appropriate rate of discount is the market rate, which includes both time discount and risk discount factors, and will differ from the social discount rate because of taxes on capital. In times of general price inflation, the risk discount factor is increased for individuals and firms, causing a further divergence between the market rate and the social rate of discount.(6)

When taxes and inflation risk premiums are taken into account, the real market rate of discount currently applied to future effects may be significantly above the normal real social rate of discount in an economy with low rates of inflation. Even ignoring such tax effects and risk premiums, however, the effect of discounting future effects at a "normal" real rate of 3.5% or 4% per year is to give very low weight to effects that occur more than a few decades in the future. Accordingly, even if all local or global externalities were fully compensated for when they occurred, negative externalities occurring even in the not-too-distant future (say in our great-grandchildren's generation) would still be given virtually no weight in market calculations.

The appropriate weight to be accorded to costs that will be borne by future generations is not easy to determine. A strong case can be made that on important conservation issues such weights should reflect a zero rate of discount.(7)

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6 This additional "inflation risk" arises from an increase in the variance of relative prices, resulting from the fact that different prices cannot be adjusted at the same speed in response to an unanticipated inflation in costs. Such variance in relative prices increases the likelihood of unexpected changes in margins between prices and costs, causing investments to become riskier. This effect of inflation-induced increases in risk is one of the major causes of the dead-weight social loss associated with inflation.

7 Cf. Solow, "The Economics of Resources or the Resources of Economics", *American Economic Review*, 54 (May 1974) 1-14. The case is essentially a negative one, and due to Ramsey ("A Mathematical Theory of Savings", *Economic Journal*, 38 (December 1928), 543-59): can one find a rationale for giving less weight to the utility of future generations' consumption than to that of the current generation? It is hard to find ethical grounds on which to answer this question in the affirmative.

Whether one agrees or disagrees with that, there are strong grounds for believing it should be less than the market rate of discount.

The effect of market myopia is that, even if externalities could be compensated for by transfers when such externalities occur (so that such externalities are internalized in land development decisions), the decisions made by private land developers would still not be socially optimal. Accordingly, further government intervention to offset the underweighting of future social costs would be appropriate.

2.2 COSTS OF CONTROLS

In determining the optimal amount of government intervention in the land market, it is necessary to set the foregoing reasons for government intervention in land-use decisions against the costs of controls. In this section, the costs of a fixed (static) regime of controls will be discussed.

For society, such costs consist of the resources consumed by the process of administering land-use controls; costs borne by developers may or may not exceed the social costs of regulation. These social costs are of several types.

One avoidable social cost resulting from any form of control is the dead-weight loss resulting from transactions costs and delays incurred through the implementation of controls. These costs may take many forms. They may consist of increases in accounting staff to deal with additional transactions (as is the case with special taxes). Alternatively, the primary costs of such controls may be additional legal talent required to shepherd a company through the complexities of regulatory intervention. These requirements for additional labour input will occur both for government regulators and for regulated property owners.

An important additional component of these social costs is the carrying costs resulting from the time that must be allowed

for gaining approval of a development.(8) Under the present system of land use controls in Ontario, the costs of delay have become a significant component of the total costs of government intervention. Though some delays may be reduced by increases in administrative efficiency, they are an unavoidable component of regulative review.

All the above control costs result in an increase in the supply price of new housing or of industrial or commercial space. These costs may be accentuated by the effect of controls on the degree of competition among suppliers of developed land. To the extent controls create economies of scale through introducing high fixed costs of dealing with the regulations, they may decrease competition in the supply of housing.

An additional social cost resulting from controls arises from the fact that governmental intervention is necessarily imperfect, acting through rules that may preclude desirable choices. The consumption choices of individuals may thus be reduced by the very intervention designed to prevent such consumption choices being narrowed in a different way by the effects of private development. The imperfect nature of government intervention occurs because of difficulties in defining precise rules and enforcing even simple ones.

In determining the optimal amount of government intervention, it is necessary to trade off the benefits of additional regulations against the costs of additional intervention; both will be reflected in the political process in a variety of ways. The central policy problem is to find the most efficient tradeoffs between benefits and costs, or in other words to try to minimize the costs of any desired level of controls.

Addressing this problem does not imply a determination of the "optimal" degree of government intervention. What is

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8 It should be noted that in a purely static context with known development control regulations the behaviour of participants in the market can be expected to adjust to these regulations so as to minimize any added carrying costs. The impact of delays is more pronounced in its effect on market prices during a period in which there is an unanticipated increase in demand, since the effect of such delays is to slow down the normal supply response in such periods.

optimal is inherently a political decision, made through the workings of the political process. However, the political issue will obviously be affected by improvements in efficiency that reduce the social (and hence political) costs of any given regime of controls.

Increases in the efficiency of land development controls can be obtained in two ways: first, by improvements in the decision-making process through which development applications must pass and, second, by refining the instruments of development control that can permit "minor" decisions to be processed more expeditiously. Both these options will be discussed in the second part of this report.

2.3 EFFECTS OF UNCERTAINTY

So far the costs and benefits of land use controls have been discussed in a static context. That is, the efficiency of the allocation of uses to different lands in a static equilibrium with controls has been compared with the efficiency of allocation in the different static equilibrium that would result without zoning laws or similar institutional devices. The discussion has concentrated on the necessity of government intervention to ensure that the marginal conditions faced by property-owners in decentralized decision-making are those required to attain social efficiency.(9)

Allocation in fact is accomplished in a dynamic context, in which information and transactions costs, uncertainty, and limited hedging opportunities affect behaviour. These factors influence land use controls in two ways: First, they introduce additional variables into the demand for land use controls, in part because controls can provide "collective insurance"

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9 Note that it is not necessary in the foregoing discussion for the resulting equilibrium in either case to be determinate. Indeed, a classic paper has indicated that land use constraints may be required to obtain a determinate decentralized static allocation of land uses. Cf. Koopmans and Beckmann, "Assignment Problems and the Location of Economic Activities", *Econometrica* (January 1957).

against risks of capital loss which cannot be insured against in the private insurance market. Second, they introduce additional potential social costs, because zoning bylaws can engender increases in uncertainty in particular situations.

Land use controls as "collective insurance"(10)

Uncertainty about changes in neighbourhoods affects locational choices and land values. Its importance is enhanced by the significant costs generally associated with a change in location. These costs include not only those of transactions and moving costs but also those of modifying a dwelling unit or business location to meet the tastes and requirements of the occupant and those of obtaining information about other locations.

Government-administered land use controls provide one means by which such uncertainty can be reduced for a subset of neighbourhood characteristics. Private institutional devices (restrictive covenants in deeds) have been utilized in some areas for this purpose, most notably in Houston, Texas, where restrictions on the use of land are included in most land titles for single-family homes.(11) Even where zoning ordinances are not used (and in Houston such ordinances have twice been rejected in city-wide referenda), a number of other means of government intervention are used to control land uses. In Houston these include subdivision controls, setback requirements for new apartments and commercial buildings, off-street parking requirements, anti-pollution laws, traffic entrance

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10 The discussion in this section is heavily influenced by Breton, "A Positive Theory of Land-Use Regulation", mimeo, 1975

11 A standard form of such covenants is a condition of loan approvals in all new subdivisions in Houston financed by FHA and VA loan programs. The covenants typically include provisions for automatic renewal for ten-year periods ad infinitum unless such renewal is opposed by a majority of affected property-owners. Deed restrictions typically limit subdivisions to single-family usage during the life of the restriction and frequently limit uses in commercial strips adjoining residential subdivisions. Cf. Siegan "Non-zoning in Houston", 94-5.

and exit controls, and minimum interbuilding distance requirements in the building code.(12)

Land use controls as contributors to uncertainty

Government-administered controls (unlike restrictive covenants) also contribute to uncertainty, partly because they can be manipulated, whether in the interest of landowners or of politically organized residents. That is, they may be changed by political action at any time and either loosened or tightened. Uncertainty is thus created both for those being protected and for those being restricted.

Minimizing uncertainty about future land use controls should be a central target of any reform. Increases in uncertainty may significantly limit investment in development and maintenance. For developers, greater uncertainty inhibits land assembly for new developments allowable under present controls. For the residents and commercial interests being protected, uncertainty about whether protection will continue inhibits investment in the maintenance of existing facilities. The social costs of reductions in investment can be severe.

The social costs of uncertainty are especially high where the demand for land is changing most rapidly. In such areas the two extreme cases of no regulation or completely stable regulation may both be socially more efficient than intermediate cases of "flexible" regulation. Regulations which can easily be changed may induce more uncertainty than would the

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12 Ibid. 76-7, 99, 116-17. It is noteworthy that subdivision controls include minimum lot size requirements (at least 50 feet wide and 100 feet deep for single family houses, at least 20 feet wide for townhouses), setback requirements, and other controls normally found in zoning bylaws. Moreover, these requirements apply not only in the 450 square-mile area included within Houston's boundaries, but also extend to neighbouring areas. All land in a 2,000 square mile region surrounding the city is subject to Houston's subdivision controls.

absence of regulations.(13) The effects of stable regulations can be predicted by any affected household, firm or property-owner, who can adjust his decisions to reflect them. Market-induced changes in land use are also more predictable than political decisions, in part because of the evolutionary nature of changes in local aggregate demand.

The value of stability in regulation is of course well known; it is the basis for the public finance maxim that "an old tax is a good tax". While this maxim is only a half-truth, because the social benefits of changing a particular regulation or tax may often exceed the costs, it is worth remembering that change is not costless. Instability in regulation can conceivably have social costs which exceed the benefits of any set of regulations. The social costs of unstable regulation may be particularly severe in urban areas. The potential for uncertainty is considerable in the areas surrounding the central core of a large city which depend on continued investment in renovation and repair. In such areas stable controls can be crucial. The importance of stability means that change should be difficult and deliberate.

2.4 INSTRUMENTS FOR CONSISTENCY THROUGH TIME

A number of components of the current land use control system in Ontario limit the flexibility of local councils. These components include requirements for provincially approved official plans to which new zoning bylaws and other municipal ordinances must conform, provincial hearings of objections to municipal decisions, and numerous restrictions regulating the

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13 In addition, the opportunity for redistributing wealth among property-owners created by flexible zoning laws provides an incentive for municipal corruption, which can further increase the uncertainty faced by property-owners and tenants. While examples of municipal corruption have been relatively infrequent in Ontario, this may in part be due to the checks built into the decision process in the current system through the role of the Ontario Municipal Board and through the impeding effects of previously-adopted official plans.

process of municipal decision-making. Moreover, these limits have been administered in the context of a generally perceived requirement for "planning consistency" and "good planning" which has enhanced the importance of precedent and consistency.

The institutional structure of the planning process may place quasi-constitutional constraints on municipal decisions, that is, externally imposed rules making certain actions difficult for a local council to undertake or protecting individual citizens from arbitrary council decisions.(14) Alternatives to that structure might include stipulating larger than simple majorities for passing planning bylaws or establishing rights of citizen participation. Further examples of alternative quasi-constitutional restrictions may be found in other jurisdictions. In the United States changes in zoning bylaws in certain states may have to be passed by more than a simple majority. For example, the opposition of neighbouring property-owners to a proposed zoning change may require that the zoning amendment be carried by a two-thirds (e.g. in Illinois) or three-quarters (e.g. in Texas) majority of the local council.(15) Further statutes sometimes allow neighbouring owners "substantially affected" by a zoning violation to sue the violator to compel compliance with the zoning bylaw in cases where the municipal government has not undertaken such action.(16)

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14 Calling such constraints quasi-constitutional reflects the fact that, for a municipality, they not only define the rules governing local decision-making but also effectively limit the range of actions a municipal council may adopt. The restrictions are of course not constitutional in the legal sense, in that they may be changed at will by the provincial legislature. (Indeed, in this strict sense, municipalities are not even recognized by the Canadian constitution and have no constitutionally entrenched powers). Nevertheless, from the viewpoint of municipal decision-makers, such restrictions have the same effect (and are as difficult to change) as if they were provisions of a constitution.

15 A protest by 20% of adjoining and "across-the-street" owners will require such vote by the council. These provisions of the Illinois and Texas statutes are cited in Siegan, "Non-zoning in Houston", 83, fn 29.

16 For example, under a 1969 Illinois statute, an owner or tenant within 500 feet of a violation may sue for compliance, and if successful can recover his attorney's fees. Ibid. 82, fn 29.

In Ontario the institutional administrative structure limiting the authority of municipal councils therefore has its merits. However, a substantial number of the changes recommended by the Robarts and Comay reports are aimed at removing or reducing such restrictions. If this is done, some alternative forms of restraint will then be needed. If quasi-constitutional restrictions on municipal authority are not designed into a revised planning structure, political pressure for more provincial intervention in local planning will arise. In this sense the existing institutional structure, though deficient in many ways, may provide opportunities for local autonomy by reducing the perceived costs of such autonomy. Though this seems paradoxical, restrictions on the way decision-making authority is exercised within the municipality may result in greater real local autonomy from provincial intervention on substantive issues than might be permitted were such restrictions removed. This point is discussed further in chapter 4.

In effect, a crucial issue is whether quasi-constitutional safeguards on local decisions will be provided through provincial review or through incorporating quasi-constitutional protections into the local decision-making process. Political pressures to reduce uncertainty will not permit full municipal autonomy to be realized, and the relevant policy problem is thus how best to reflect these pressures.

Chapter 3

The political decision process

The preceding chapter assumed that the appropriate trade-off between the benefits and costs of land-use controls is determined politically. How such decisions are made, and how conflicting interests are represented in the political process, are discussed in this chapter.

Perhaps the most important source of problems in making political decisions on land use is the fact that political boundaries are arbitrary and do not necessarily include all the individuals affected by externalities. The boundary problem is discussed in the first section of this chapter, particularly in relation to urban agglomerations that include more than one municipality. Wider "spillover effects" of province-wide significance are discussed in the fourth section.

A related set of problems concerns the resolution of conflicts between majorities and significant minorities within a single political jurisdiction. Even when a municipal boundary does include all affected interests, the specific nature of land use decisions at the municipal level provides more room for conflicts over minority "rights" there than ordinarily exist at higher levels of government. The causes and implications of this are discussed in the second section.

The minority rights problem is related to the boundary problem. In many instances minorities could become majorities if political boundaries were redrawn.(1) The question is aggravated in Ontario by provincial government attempts to amalgamate local municipalities. The solution to a boundary

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1 Or vice versa. The provincial government's decision in 1967 to merge the thirteen municipalities within Metro Toronto into six units created distinct minorities within the new local municipalities. Subsequent similar decisions have been made in the new regional municipalities established in the early 1970s.

problem can thus be the cause of a minority rights problem.

Whereas the first two sections treat decision-making simply as a question of a majority vote (as if all decisions were the subject of referendums), the third section looks at the actual working of the political process. The nature of political participation is analysed, in part through economic models of political behaviour developed by Breton, Hartle, and Downs,(2) with emphasis on how changes in political structure can increase or decrease the effective participation of citizens in decision-making.

Over-all, the chapter points out the dangers of assuming too quickly that local autonomy means political accountability.

3.1 THE BOUNDARY PROBLEM

There is little logic or rationale other than historical precedent in the location of municipal boundaries. Nevertheless, those boundaries determine who is represented in a local council that may make land-use decisions causing spillover effects on neighbouring areas.

Spillover effects

These may be of regional or local significance. The likelihood of local spillover effects is increased in urban areas (where externalities are enhanced by the greater proximity and number of neighbours) and further increased where

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2 Cf. Breton, *The Economic Theory of Representative Government*, Aldine, 1974; Hartle, *A Theory of the Expenditure Budgetary Process*, Ontario Economic Council, 1976; Downs, *An Economic Theory of Democracy*, Harper and Row, 1957. All these models focus on the effect on the workings of the political process of individuals' evaluations of the costs and benefits to themselves of different actions and of different forms of participation in the political process. While such models are sometimes attacked as assuming excessive rationalism on the part of participants, they provide enlightening insights into the effect of institutional changes that affect the costs (in time as well as money) of participation.

such boundaries are not coterminous with natural topographic features. They are thus particularly likely in large urban areas containing several municipalities, such as Metropolitan Toronto, where in some cases single properties span a municipal boundary.(3)

Local spillover effects make necessary some restrictions on the authority of local councils regarding land uses on or near municipal boundaries. Procedures for dealing with this problem will be discussed in the next chapter (Section 4.4) and in chapter 7.

Regional spillover effects are more serious. They affect more individuals (albeit indirectly rather than directly) and cannot be dealt with as easily at the local level as by a single regional government. A regional spillover normally concerns a global externality and thus requires a co-ordinated regional policy. With multiple jurisdictions, opportunities for competitive zoning practices aimed at luring desirable land uses (e.g. high assessment industry) or at discouraging undesirable land uses (e.g. low-income family housing) are omnipresent.

In most urban regions of Ontario, the introduction of two-tier regional governments has provided an institutional structure in which regional spillover effects can be dealt with,(4) and ways of using it are discussed in the next

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3 The Robarts commission proposed a revision of municipal boundaries in Metropolitan Toronto aimed in part at obtaining "natural" boundaries. However, in spite of this rationale, few naturally divisive topographic features (such as ravines, railroads, or expressways) are used as boundaries in the Robarts proposals, even in cases where they could be. Moreover, by tending to lay boundaries along arterial roads (e.g. on Danforth or St Clair), the opportunity for spillover effects is enhanced. The Robarts commission wished to obtain boundaries that better coincided with residential neighbourhoods. But moving an arbitrary boundary to a different but equally arbitrary location may simply solve one problem by creating another.

4 The introduction of two-tier regional governments was strongly recommended by the Smith committee as a required condition for municipal fiscal reform. See *Report of the Ontario Committee on Taxation*, Toronto, 1967, Vol. 2, chapter 23. The committee's recommendations were largely implemented (though in modified form) in the succeeding six years.

chapter. Regional government, of course, limits the authority of local municipalities.

Special problems in the Toronto-centred region

Because of the size of the Toronto-centred region, particular problems arise. One of them is that whereas a regional government can span a whole region around smaller cities such as Ottawa, Sudbury, or Kitchener-Waterloo, in the Toronto-centred region there are seven separate regional governments. Regional spillover effects are thus possible not only within but also between regional governments.

The seriousness of such potential spillovers should not be underestimated. For example, the emerging Official Plan for Metropolitan Toronto significantly depends on regulating the location of commercial offices (other than those ancillary to industrial uses) and especially on keeping new commercial developments from being dispersed in low-density mixed commercial/industrial areas. The success of this plan and of the transportation investments it calls for could easily be prejudiced by inconsistent or competitive industrial/commercial policies in, say, the York Regional Municipality to the north of Metro Toronto, or in other neighbouring regional governments. Within the Toronto-centred region, there is currently no effective mechanism for dealing with such conflicts.

3.2 THE MINORITY RIGHTS PROBLEM

As we have seen, minority rights are virtually another aspect of boundaries. Local majorities may be transformed into potentially "oppressed" minorities by an arbitrary boundary change, and this fact complicates any model of the municipal political process.(5) The problem of minority preferences will

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5 The problem of substantial minorities and of determining which (if any) "rights" of such minorities should be protected is of course not solely a problem of local government, as the current Quebec crisis illustrates. However, it is of particular importance at the municipal level because of the relatively large potential redistributions of wealth which can result from municipal land-use decisions.

be discussed, first, in terms of the social costs of governmental amalgamations and, second, in terms of protecting minority rights in deciding changes in land use.

The social cost of amalgamations

Where there are many autonomous municipalities within an urban area, each municipality may have a distinct personality, attracting certain kinds of people with common preferences regarding land use controls and the provision of other public goods. A variety of communities permits individuals and businesses to "vote with their feet" by locating in a jurisdiction where their views match those of the dominant local majority. When a community becomes strongly differentiated from residents of neighbouring areas, its opportunity for collective decision-making is valued and the prospect of annexation feared. By providing a diversity of governmental services, a large number of separate, small municipalities provides a range of choices to individual households (exercised through relocation) and allows competition in the provision of local government services.(6) In effect, a variety of local governments within an urban region permits a quasi-market allocation of public goods.

The choice of land-use controls is an important component of the public goods provided by a municipality. Any reduction in the number of municipalities or in their autonomy obviously reduces the extent to which differing individual preferences can be satisfied. Accordingly, there is a social cost unavoidably associated with actions (such as restrictions on local autonomy or amalgamation of municipalities) designed to ameliorate negative spillover effects or provide for representation of external interests.

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6 Indeed, it can be shown that the existence of a large number of local municipalities within a region is a necessary condition for a socially-optimal allocation of public services within a region. Cf. Tiebout, "A Pure Theory of Local Public Expenditure", *Journal of Political Economy* (October 1956). A substantial literature has been developed using the Tiebout model; cf. for example Buchanan and Goetz, "Efficiency Limits of Fiscal Mobility", *Journal of Public Economics* (Spring 1972).

Minority rights in discrete land use changes

Certain land-use decisions with important global externalities are highly discrete in their effects. That is, such decisions result in significant changes in neighbourhood characteristics which, if unanticipated, can result in widespread major changes in land values. Major transportation improvements are one example. Because of the substantial redistribution of wealth which can result from such decisions the problem of minority rights is acute. In general, a minority, rather than the majority, is likely to lose, and a system of unrestricted majority rule will encourage a dominant majority to reject compromises and tolerate or even seek unnecessary redistributions of wealth.

The problem of minority rights, present in any political system, is of particular importance at the local level because of the spatial concentration of minorities and the potential for redistribution of wealth inherent in local planning decisions. The unique political magnitude of minority rights in local planning reflects not only the great increments or losses in individual wealth which can result from market capitalization of the effects of political decisions but also the ease of coalition formation among people living in close communication who are significantly negatively affected by a decision. The possibilities of a minority's being exploited or resorting to bitter confrontation policies(7) make it essential to protect

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7 As an example, the prolonged and bitter confrontation within Metro Toronto over the subsequently vetoed majority decision to extend the Spadina Expressway through central area residential neighbourhoods has damaged the metropolitan government through its legacy of mutual distrust between city and borough representatives. A process involving quasi-constitutional requirements for obtaining some compromise at the Metro level instead of requiring the compromise to be effected through provincial decision might have resulted in a similar eventual decision with less damage to the metropolitan governmental process. While it would be unrealistic to assume that the Spadina conflict could have been avoided, and indeed to assume that the final policy choice now accepted by most Metro residents and politicians could have been reached without the intense political involvement triggered on both sides at different times by the dynamics of the confrontation process, it is possible that the confrontation could have been channelled into a process that encouraged more compromise within the Metro decision-making process.

minority rights by the institutional structure of the planning process. Such protection might be achieved through quasi-constitutional decision rules that shelter minority interests in such a way as to provide incentives for the majority to seek compromises with a significant minority.

Minority rights vs spillovers

Integrating these two aspects of the planning problem, an ideal institutional structure would probably be obtained if local municipalities were sufficiently small to include a relatively homogeneous set of inhabitants, so that on the one hand a greater variety of municipal services could be offered within an urban area and on the other the opportunities for majority exploitation of significant minorities would be minimized.(8) Such an arrangement would of course maximize (relative to alternative structures) the likelihood and incidence of spillover effects.

One advantage of dealing with the minority interest problem by dividing an urban area into smaller municipalities is that virtually all spillover problems could be dealt with as intermunicipal conflicts. The advantage with intermunicipal conflict resolution is that it facilitates the formation of collectives. Moreover, since the current regional government system already exists as a forum for dealing with such conflicts, a greater variety of lower-level municipalities need not involve significant social costs.(9)

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8 Such an institutional structure (a large number of municipalities within a region) would also permit municipal specialization in the provision of other public goods, and so permit a more socially-optimal allocation of resources to public goods. Cf. Tiebout, "A Pure Theory of Local Public Expenditure".

9 In addition, the two-tier form of organization provides a mechanism through which potential economies of scale in the provision of area-wide services can be attained while providing for differentiation in local public goods. Making the problem one of intermunicipal conflict resolution does not resolve it but does make it subject to intermunicipal negotiations and adjudication by higher levels of government rather than to minority-crushing, region-wide majority votes.

3.3 THE NATURE OF THE POLITICAL PROCESS

The nature of the political process is important in two ways. First, the institutional planning structure can affect the accountability of elected municipal councillors by the availability and quality of information it presents on municipal planning decisions. Second, whatever institutional innovations are made, the underlying political behaviour, determined by motivations and personal contacts, will to some extent remain unaffected. Some functions the political process will be able to perform, and others it will not, regardless of institutions.

Availability and cost of information

Municipal politics is time-consuming. In part, this is the result of the need for continuous refreshment of political alliances. But a more important reason is the high cost in time and money of obtaining information about recent or impending municipal decisions. Having an effect on the cost are such information-organizing institutions as libraries and such disseminating institutions as *Hansard* and the media. A market for such information can, if large enough, support specialized private services that can significantly reduce the costs of keeping informed, through collective information-gathering activities, and so allow an individual citizen to substitute a relatively small monetary outlay for a relatively large private investment of time.(10) The size of the market for information is an important determinant of its private cost.

The market for information on government actions depends both on the number of individuals (or firms) potentially affected and on the likelihood (as perceived by such individuals) that a relevant government decision will occur. The perceived return to an individual from information on government actions

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10 Collective action may also take the form of voluntary co-operation. Ratepayer's associations and other citizen organizations exist in part to provide a co-operative means of reducing the costs of information.

is obviously related to the perceived likelihood of being affected, as well as to the extent that possessing such information may permit the individual either to influence the decision or to take adaptive action. The more indirect or unavoidable the effects of a decision, the lower are the perceived returns from information and hence the lower the demand for it.

On the supply side, the costs of providing information are affected both by the regularity and frequency of decisions and by their relevance to the same group of citizens. Where decisions are made regularly and frequently on matters of importance to a constant group of individuals, it is relatively easy to organize an information service that reduces the cost of information to each individual in the group. Conversely, where a large number of decisions are made, but few affect a particular group, the costs of providing information to that group will be relatively high. Municipal decisions are largely of the latter type--numerous, but seldom affecting the same groups. The cost of disseminating information is consequently high. Coupled with the smaller size of the market for information at the municipal level (compared to that at the provincial or federal level), it is relatively difficult to organize the dissemination of information on municipal decisions.

Local decisions are generally not well reported in the media, and other information-disseminating services are at best rudimentary at the municipal level. Accordingly, an individual citizen (or citizen's organization) must invest substantial amounts of time to keep well informed of the activities of a local council. The high costs of information are an advantage to the municipal councillor who would prefer to select the information disseminated to constituents about his actions and so reduce real political accountability. A corollary is that high information costs reduce the effectiveness of citizen participation. These information costs are exacerbated by the multiplicity of municipal land-use decisions and by their interdependence and complexity. It is difficult, without continuous monitoring of the debates of a local council, to

keep informed of past, present, or potential decisions which may affect an individual's interest.(11)

Given the importance of information costs, the effect of the planning process upon the organization of information can make an important contribution to the quality of political accountability and to the productivity of individual political participation. By providing for a hierarchy of decisions, in which new zoning bylaws are required to conform to the provisions of official plans, and by making official plans relatively difficult to change, the present system possesses an instrument for reducing the cost of information.

This instrument is not universally used for this purpose. Nevertheless, in municipalities where the official plan is sufficiently precise to impose limitations on implementing bylaws, the current system can reduce the need for information and can channel citizen participation into the definition of municipal land-use policies for an area. By doing so, and by enhancing the consistency of land use decisions at different locations within a local area, the use of official plans increases the productivity of citizens' investments of time and encourages more active citizen participation in municipal planning actions.

"Natural justice" in the political process

In planning for specific sites, a tradition has developed that such matters should be decided in accordance with procedural rules that ensure that "natural justice" will be afforded to all interested parties.(12) These procedural rules

11 In this connection, it is becoming increasingly difficult for citizens' organizations to undertake such monitoring, because of the increasing tendency for married women who previously performed this function to become active participants in the labour force.

12 In dealing with zoning bylaws, the courts have distinguished between general, area-wide bylaws and site-specific bylaws, holding that in adopting the former a council is acting legislatively rather than judicially and rules of natural justice do not apply in such cases. See e.g. *Re McMartin et al.* v *City of Vancouver* (1968), 70 D.L.R. (2d) 38. However, in cases involving spot rezonings or situations where a council is adjudicating between specific interests (e.g. a developer vs neighbouring property owners), the courts have established that parties to the dispute have a right to a hearing that is subject to such rules. See *Wiswell* v *Metropolitan Corporation of Greater Winnipeg* (1965), 51 W.W.R. 513.

normally include rights to adequate notice, to information concerning a prospective decision, to a hearing before all members of a decision-making body, and to present evidence, cross-examine opposing claims, and be represented by counsel in such hearings. In addition, these rules are generally held to provide that an affected individual has a right to an objective hearing by open-minded decision-makers and that a member of a decision-making body cannot commit himself in advance of a hearing. These rules are generally held to apply in cases involving decisions made by administrative tribunals and are regarded as particularly relevant in cases in which property interests and individual rights are affected (particularly where the outcome may result in significant changes in the wealth of affected parties).

In Ontario jurisprudence, municipal councils have been exempted from the rules of natural justice partly on the ground that they do not have final authority for planning decisions. Specifically, it has been held by the courts that, because the final decision-making authority on zoning bylaws rests with other bodies, a municipality in Ontario is not bound to follow rules of natural justice in its procedures for dealing with rezoning applications.(13) Presumably this precedent would imply that such rules need not be followed with respect to other planning actions.(14)

If municipalities were subject to such rules, it would be difficult for the political process to operate effectively. It is both impractical and undesirable for members of a council to refrain from making prior commitments of their position on an issue prior to hearing all sides. The time required by a public hearing in which all parties have rights of cross-examination cannot be provided by a local council (or even a committee thereof) without significantly interfering

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13 See for example *Re Zadravec and Town of Brampton* [1973], 3 O.R. 498.

14 In other planning actions, such as the application of Section 35a or demolition control powers, final decision authority, and the responsibility to hold hearings, has been vested in the Ontario Municipal Board. With respect to official plans, final approval authority also rests with the province.

with the council's ability to handle its legislative functions. Wherever the rules of natural justice apply, they can be used by parties with substantial resources to make it impossible for other citizens to participate effectively.

Since before an election voters ought to be as fully informed as possible about the candidates' views on a municipality's future planning actions, it is unreasonable to expect members of a local council to refrain from making advance commitments to voters as to how they will respond to applications for rezoning. Indeed, it would be unfortunate for the functioning of local democracy were councillors to be discouraged from informing voters of their positions. Disqualification of committed councillors would simply imply the disfranchisement of voters choosing their representatives on the basis of such commitments.(15)

Beyond this, it is clearly difficult for a hearing in the sense defined by rules of natural justice to be conducted by a municipal council, if only because of the time requirements imposed by such rules. Were municipal decision procedures to be subject to such rules, the procedures would break down. To overcome this, a delegation of the hearing function would become mandatory.(16) Whether such delegation and subsequent decision-making by a local council having regard for the report of the hearing officer or agency would provide adequate protection for the rights of affected individuals is subject to debate.

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15 In this respect, it is difficult to accept the Comay Report's suggestion that grounds for appeal for provincial intervention should include such prior commitment. Specifically, the Report states (paragraph 10.10) that "It should be possible to complain that members of a council had effectively committed themselves to a particular course of action prior to holding a hearing on the matter, and that as a result, the council did not fairly consider the information and submissions made to it at the subsequent hearing". While the reasons for the concern expressed in this statement are clear, the implications for the municipal political process are potentially far-reaching.

16 Such delegation is proposed in Jaffary and Makuch, *Local Decision-Making and Administration*, a study prepared for the Royal Commission on Metropolitan Toronto. Jaffary and Makuch propose that municipalities be empowered to appoint municipal hearing officers for this function.

The third problem is one of equity, arising from the effect of providing full rights of presentation of evidence and of cross-examination to all affected parties. Because the effect of such provisions is to lengthen substantially the time taken for a hearing, and because many affected parties have limited time and resources, the lengthening of the hearing effectively precludes equal participation by all affected parties. This problem is an unavoidable result of formalization of the hearing process. In effect, this problem makes it difficult to provide real natural justice to all affected parties without heavily subsidizing the costs of representation by counsel for affected parties otherwise not able to participate.(17) As a result, a decision regarding the extent to which rules of natural justice are given primacy is really a choice of to whom justice is to be afforded.

A corollary of this equity problem is that in precluding equal participation by all affected parties the provision of a formal hearing procedure including rights of cross-examination at the municipal level would discourage participation by citizens who may be intimidated by counsel for opposing interests or who may simply not have the time to participate in a lengthy hearing. Citizen participation, though sometimes angry and vociferous, is often easily discouraged through the formalization of a hearing process.

The problems that would be created at the municipal level by requiring planning hearings to be subject to all of the procedural rules aimed at ensuring natural justice are fundamental. While some of these "rights" may and should be protected by procedural safeguards (discussed in the next chapter) the provision of full rights of natural justice to all

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17 This is of course now a problem in hearings at the Ontario Municipal Board. As a practical matter, citizens or citizen organizations unable to raise the funds required to pay for legal counsel and for expert witnesses are not afforded the same rights to be heard as those who can. Board practices (such as holding hearings during normal working hours and not making transcripts of evidence and cross-examination available to citizens unable to be continuously present) exacerbate the effective exclusion of ordinary citizens from participation in Board hearings.

vested interests within the municipal decision-making process is incompatible with the healthy functioning of local democracy.

Procedural justice vs substantive fairness

Even if municipal councils were to make decisions on planning matters in a way that conformed to the procedural requirements of natural justice, individual citizens would still wish to be able to appeal for an external assessment of municipal decisions deemed by them to be unfair. Indeed, much of the motivation for concern over whether rules of natural justice would be followed by municipal councils has been an underlying fear that municipal councils may be "unduly" influenced by "special interests".(18) This fear is not really a concern about procedural rights; rather, it is a concern about the likely results of unconstrained municipal decisions even if the decision-making process is procedurally correct.

In evaluating this concern, it is necessary to emphasize that a fundamental problem arises from the difficulty of separating concepts of "fairness" in a planning action from subjective views of the merits of such action. There is an unavoidable conflict between the democratic determination of planning policy and the protection of individual rights.

The essence of the problem created by the conflict is twofold. On the one hand any municipal planning action (whether general or site-specific in its effect) is inherently a determination of planning policy that reflects subjective values, and hence is in the last resort a political issue to be decided through the political process. On the other hand there

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18 For example, in its discussion of the difficulties faced by a municipal council in acting as a hearing body, a brief to the minister of housing from the Municipal Law Section of the Canadian Bar Association (Ontario) on the report of the Planning Act Review Committee states (pp. 15-16) that "Municipal councillors may be elected upon platforms appealing to special interest groups and therefore the rules against prejudice, bias and impartiality [sic] are extremely relevant, and difficult to apply". The brief argues that in consequence, municipal councils ought not to have final authority for planning decisions.

is a strong belief (whether based on tradition or on other grounds) that planning decisions are partly judicial in nature, and that judicial or quasi-judicial protections of individual rights are required to ensure fair decisions.(19) The implications are that such protections cannot be fully provided without seriously reducing the effectiveness of the democratic political process.

The importance of this conflict between the democratic process and the protection of individual rights cannot be overemphasized. While, as with any conflict, some compromise is likely to provide the least unsatisfactory resolution, no institutional structure can meet all concerns. Any municipal planning decision contains both adjudicative and political components which cannot be neatly separated. It is consequently necessary to allow for both components in the institutional structure of the planning process in order to obtain a reasonable compromise between preventing injustice and enhancing local democracy.

3.4 THE ROLE OF THE PROVINCE

Because of the necessity of providing for the adjudication of intermunicipal disputes within a region, the province must play an important part in the planning process. The provincial role is enhanced by the facts that local planning decisions may also be inconsistent with the goals of provincial policy and spillover effects from local decisions may be of province-wide rather than just regional significance. Examples of province-

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19 Judicial protections of procedural rights would of course exist in any system. However, as the Comay Report points out (paragraph 10.11), the courts provide a remedy only for extreme violations of the normal process. The reluctance of the courts to overturn municipal decisions except in extreme cases reflects their unwillingness to interfere with or review political policy determination; cf. *Cadillac Development Corporation* v *City of Toronto* (1974). The courts will, however, intervene where there is judicially determined discrimination or bad faith; see *City of Halifax* v. *Hollett* (1976), 66 D.L.R. 3d 524. Moreover, because of provisions in the Municipal Act for the quashing of bylaws, such actions can be undertaken relatively quickly and cheaply.

wide planning issues of importance are the preservation of farmlands, the control of regional sprawl, the effects of regional development on provincial economic growth, and the interaction of local and regional land use policies with the utilization of provincially-funded transportation and servicing facilities. The provincial government has a responsibility to develop policies that respond to these issues and to intervene in local decisions that are contrary to provincial planning policies.(20) Another reason for provincial intervention is to represent potential residents who may be excluded from a municipality as a result of municipal planning actions, such as exclusionary zoning practices.

The definition of the provincial role in planning can be stated only in the most general terms. It is therefore important to limit the grounds for provincial intervention, not by attempting to define the range of issues that are of provincial interest, but rather by requiring that the province justify each intervention through a written statement of reasons.

This discussion of the provincial role in planning has been confined to the question of spillover effects from local planning decisions which impinge upon provincial policies on the environment or on economic development. It has not dealt with the province's role in implementing an institutional structure for the resolution of intermunicipal conflicts, the protection of minority rights, the hearing of unrepresented interests, or the assurance of consistency over time. These process-oriented issues, together with the recommendations of the Comay and Robarts reports that affect them, are discussed further in the next chapter and in the second part of this report.

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20 It should be emphasized that most province-wide planning issues are highly complex and policies responding to them are likely to be developed gradually and in response to specific problems. Accordingly, it is unrealistic to expect provincial policies to be articulated through comprehensive provincial plans. Instead, policies should be expected to evolve through developing a consistent rationale for successive provincial interventions on specific issues.

Chapter 4

Alternative restrictions on local authority

A social optimum in land allocation, we have seen, depends on a system of government controls on land use. The ability of political decision-makers to change land use controls must be restricted not only to make the system stable but also to ensure that when spillover effects occur the viewpoints of the affected outside interests are taken into account and the interests of significant local minorities are protected. Furthermore, a system of controls can play an important role in reducing the costs to the citizen of information about political decisions, while also helping to satisfy the widespread concern that planning actions must not disregard individual property rights. These strong reasons for government controls make it clear that complete local autonomy is neither desirable nor (in all likelihood) politically attainable.(1)

If full local autonomy must be compromised, the question is how. This chapter considers alternative strategies. To what extent should individual rights and minority interests be protected through discretionary intervention by higher levels of government or through quasi-constitutional restrictions on municipal decision-making? This issue is discussed in the first section with types of quasi-constitutional safeguards being considered in the second section.(2) Such safeguards can

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1 The high degree of activity by the provincial government in intervening in municipal affairs (both in specific decisions and in the organization of regional and local government) has created expectations that the province can be counted on to intervene "where necessary" and that it is feasible to consider innovations in institutional structure which may be required to obtain decisions that are socially more desirable. This popular perception of provincial responsibility differentiates Ontario from other jurisdictions where intervention by higher-level governments has not been traditional.

2 As noted earlier in Section 2.4, the word "quasi-constitutional" is used to indicate rules imposed on the decision-making process to provide protective safeguards, and should not be interpreted in the legal sense of provisions of a constitution such as the BNA Act.

be built to provide as well a more efficient organization of information on planning actions and to introduce greater stability and consistency into the municipal planning process.

Quasi-constitutional safeguards of individual rights and of minority interests at the local level should reduce the need for appeals for provincial intervention. Nevertheless, the right to appeal to the province cannot be eliminated, and ways in which such appeals may be structured more effectively are described in the third section. The fourth section considers methods of dealing with spillover effects by using regional governments and provincial intervention.

4.1 RULES VS DISCRETIONARY INTERVENTION

Given the generally perceived need to limit local decision-making authority, insufficient provision of safeguards in the municipal planning process will result in more frequent appeals for external intervention. As a result of the legitimate basis and political strength of demands for protection from arbitrary municipal decisions, it is entirely possible that eliminating the existing quasi-constitutional restrictions on the local decision-making process could in the end damage rather than strengthen municipal autonomy. Even if the grounds for appeal were initially narrowly defined, it would likely be difficult for the provincial government to avoid making them progressively broader in response to the continued pressures that would develop if no "constitutional" safeguards were built in. Since there must be a tradeoff between quasi-constitutional restrictions and direct provincial intervention, and given the historical preference of citizens for provincial intervention, the question most relevant to the design of any new institutional structure is the extent to which quasi-constitutional restrictions may be substituted for discretionary provincial intervention.

Advantages of quasi-constitutional restrictions

Reliance on provincial intervention to protect individual rights and minority interests in municipalities is in many respects a poor substitute for quasi-constitutional provisions. The latter encourage the development of political compromises at the local level. Furthermore, since planning decisions are also value judgements, vesting the ultimate decision in an elected official removed from the local municipality is no guarantee of fairness in the process. Effective resolution of such issues will normally depend on an intimate knowledge of the local context. By forcing compromises to occur at a local level, a "constitutional" approach involves those individuals most conversant with the specific context and most interested in achieving a satisfactory resolution. Such an approach has the additional advantage of clarity. Structuring the decision-making process at the local and regional level to protect minority rights and to discourage over-rapid changes in planning policy renders such constraints visible and promotes better popular understanding of goals and obstacles.

Of course no system can be beyond abuse, and the popular distrust of municipal politicians that is reflected in political pressures for restricting their authority is unlikely to be satisfied by an institutional structure that relies solely on quasi-constitutional safeguards. Consequently, it is not feasible to disallow appeal by aggrieved individuals to the province.(3) Nevertheless, the grounds for (and frequency of) appeal can be limited.

Quasi-constitutional safeguards in the current process

A number of quasi-constitutional restrictions on the municipal planning process already exist. Some of them depend

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3 It should be recalled that additional safeguards would in extreme cases be provided by recourse to the courts. But the courts' interpretation of what must be shown to be able to claim a violation of rules of natural justice is too narrow to permit a review of the substance of a municipal decision.

on a substantial provincial role for their effectiveness and would need to be modified in a structure emphasizing local autonomy and accountability. Others are inefficient or anachronistic. Nevertheless, they play an important role in the current system.

The central current safeguard is the official plan. The concept of an official plan to which zoning bylaws and other municipal bylaws must conform is a central part of the legal structure specified by the current Planning Act. While there are many defects in this legal structure (including considerable inconsistency in implementation), official plans have significantly reduced planning uncertainty in a number of municipalities.(4) Official plans have been difficult to change, in part because of excessive provincial intervention in approving details, and this difficulty has made them stronger.(5)

The concept of the official plan as a set of policy statements to which implementing actions must conform is a useful one. As a device for organizing political debate, it makes such debate more efficient and citizen participation easier. By introducing an instrument into the local political process that is more difficult to change than ordinary

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4 The requirement that bylaws conform to the official plan has successfully been used as the basis for appeal to the courts to have a bylaw quashed. For an example, see *Holmes et al.* v *Regional Municipality of Halton* (1977), 2 MLPR 149. In this case a regional bylaw was held invalid because of non-conformity with a local official plan. Because of the fact that a zoning bylaw approved by the Ontario Municipal Board is deemed under Section 35(28) of the Planning Act to be in conformity with any official plan, such legal challenges must be initiated prior to approval by the Municipal Board. See *Cadillac Development Corporation* v *City of Toronto* (1974), 1 O.R. (2d) 21 (H.C.) for an example of such a challenge.

5 This relative difficulty is reduced for site-specific projects for which zoning and official plan amendments are both required. Under Section 19(2) of the Act, the two amendments may be processed concurrently and, in the event of objections, are normally heard together by the Municipal Board. Nevertheless, even though the procedure followed in such cases is the same as for a site-plan bylaw that does not require an official plan amendment, the fact that proponents of the bylaw must justify the official plan change as a revision of policy generally makes it more difficult to obtain approval from the Board.

municipal bylaws, it fosters certainty.(6) A plan provides citizens and their elected local officials with a greater range of instruments through which to articulate municipal policies.

Planning instruments are not used in the same way by all municipalities. Sometimes it may be difficult to forecast the uses that may be proposed in an area, so that a planning policy can be specified only in very general terms.(7) The extent to which official plans should be used to restrict future council decisions will legitimately vary both from area to area within a municipality and among municipalities, and the present diversity in adopted plans is a reflection of this.

While the difficulty of changing official plans currently is partly derived from the delays introduced by the requirement for detailed provincial approval, their effectiveness as a restrictive instrument could equally well be achieved by introducing other requirements at the local level. These might include greater opportunities for citizen review, requirements for approval by more than a simple majority of a quorum of a local council, provisions for notice to a wider group of citizens, requirements for preliminary hearings (and for substantive responses to concerns raised at such hearings) prior to a public hearing by council of the final recommendations for an official plan amendment, and so forth.

4.2 TYPES OF QUASI-CONSTITUTIONAL SAFEGUARDS

Two types of restrictions on municipal decisions can provide useful protections of minority interests and of

6 This can be done in a variety of ways. The oldest form of restriction is simply to designate different areas in which different uses can occur. In addition, official plans have frequently been used to impose upper limits on the densities which can be allowed through rezonings, and this interpretation of their role has been affirmed in several court cases. See for example *Walters* v *Essex Board of Education* 1971, 3 O.R. 346; *Cadillac Development Corp.* v *City of Toronto* (1974). More recently, there has been a tendency also to use official plans to specify criteria in terms of which a council is to evaluate rezoning applications.

7 A related problem is that it is difficult to specify all the ways an official plan policy statement may be interpreted and thus to define policies unambiguously. Implications of this problem are discussed in chapter 6.

individual rights. The first would ensure that the process fulfils, insofar as possible, the requirements of natural justice. (As noted in Section 3.3, there are limitations on the extent to which this objective can be realized.) The second would make "important" planning policy decisions more difficult to adopt than "ordinary" municipal bylaws that implement such policy.(8)

Embedding individual rights in procedural requirements

Of the various procedural "rights" normally associated with natural justice, the following can easily be implemented for all planning actions without unduly impeding the functioning of a municipal council:

- Rights of notice: Municipalities should be required to ensure that adequate notice of a proposed planning action be given to all potentially affected parties. Such provisions should require [1] notices to be written in a form that clearly explains the effect of the proposed action, [2] delivery of notices to all residents and businesses within a given radius of the site or area affected by the proposed action, plus requirements for delivery of such notice to all non-resident property owners, [3] mandatory posting of a clearly-visible public notice on the property affected by a site-specific action, [4] area-wide advertising of general proposals, and [5] circulation of notice to all members of the executive of any citizens organizations that have registered with the municipality and are in an affected area or one nearby.(9) Adequate notice should be defined to allow affected parties sufficient time before a hearing to prepare a submission.(10)

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8 The distinction between "important" (unusual) decisions and "ordinary" bylaws is one that may potentially be applied more broadly than simply to planning actions. But in the planning context the obvious application is in differentiating between policy changes and implementing decisions.

9 Because such organizations may provide an efficient channel through which information can be disseminated to citizens, it is of particular importance to ensure that notices of all proposed planning actions relevant to the area covered by each organization are sent to them.

10 It should be noted that, in the case of citizens' organizations, such organizations may be constrained by rules that make a quick response difficult (such as a requirement that a submission be approved at a regular monthly board meeting). Failure to take such constraints into account is tantamount to excluding such organizations from effective participation at the municipal level, thus forcing them to respond by appeal to the province after a decision has been made by local council.

¶ Rights to information: This should include a right for an affected citizen or citizens' organization to obtain a copy of any reports to be placed before a council (or before a hearing agency appointed by council) in sufficient time to permit representations based on an assessment of the report.(11)

¶ Right to be heard: This should at a minimum include the right to appear as a deputant before a local council or a committee thereof, and to present a written brief in making such appearance. If deputants are heard by a committee of council rather than by the full council, then it should be mandatory that the committee hearing such deputants make a full report to the council on points raised by deputants. Such a report should summarize such points (and any responses to such points by municipal officials) and should include any written submissions presented by deputants. In addition, such a report should state the committee's conclusions and recommendations (along with reasons therefor).

¶ Right to response from municipal officials: Although it is impractical to provide all affected parties the right to cross-examination of opposing claims during hearings on a proposed planning action, it should be possible for deputants to be able to pose questions to municipal officials concerning points made in an official report or relevant issues not dealt with in such reports. Answers by officials should be included in the record of proceedings. Where such questions cannot be answered immediately, written responses should be provided to the deputant and to the council prior to a decision by council.

¶ Right to public debate: It should be a requirement that all meetings of council planning boards, or committees of council which deal with planning decisions be open to the public.

¶ Right to record of proceedings: A comprehensive record of proceedings should be prepared that includes a summary of all information presented to the council. This record should be open to examination by affected parties, who should have the right to file an objection to perceived errors or omissions in the record.

All of these rights would, taken together, go a long way toward ensuring that any objections to a proposed planning action

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11 As a practical matter this requires, first, that the report be available to the public at the time that notice of a meeting is distributed to affected parties, second, that such notice list the reports to be considered at the meeting and how copies of them may be obtained and, third, that the length of notice be adequate.

would be received by a municipal council before making a decision. They are only partially incorporated in current legislation. To specify in the Planning Act that these rights must be satisfied by municipalities in adopting planning bylaws or approving other planning actions would be an obvious improvement in the institutional structure of the planning process.(12)

These requirements would ensure that citizens' rights of participation in the process leading to a council decision are clearly defined. However, many citizens will take a proposal seriously only when it is actually adopted by council. In addition, any notice process works imperfectly in practice. To ensure that individuals are able to object to council decisions, the following additional procedural "rights" should be provided for in legislation:

- ¶ Right to notice of decisions: When a planning action is adopted by council, notice of the council decision should be delivered to all parties potentially affected by the decision, including citizens' organizations.

- ¶ Right to object: Any affected party should be able to submit a written objection to a council decision within a stated period following delivery of notice. The council should be required to confirm its adoption of a planning action to which there are objections.

These provisions for notice and confirmation of decisions should apply both to planning policy statements and to implementing bylaws. The confirmation of council decisions following the receipt of objections would in many cases be pro forma, since all of the arguments on both sides of an issue should have been presented to the council prior to its decision. Nevertheless, additional implications of a decision may come to light subsequently. The notice and confirmation requirements would ensure that council reconsiders its decision in the light of any unanticipated objections and would provide for notification of rights of appeal.

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12 Both the Comay and the Robarts reports recommend adopting legislative requirements that would ensure that most of the "rights" listed above would be safeguarded. The specific recommendations are discussed in chapter 6.

Differentiating between policy and implementing decisions

Besides guaranteeing individual rights, another question is how to make the process more efficient (measured in terms of productivity of time invested by citizens). One way is to take increased advantage of official plans. An official plan allows policy and implementation decisions to be differentiated. For this differentiation to be effective, it is of course necessary that policy decisions have some legal status and, in particular, that implementing decisions be consistent with adopted policies. Such a requirement is provided by Section 19 of the present Planning Act.(13)

The advantages of differentiating between policy and implementing decisions are fourfold. First, by clearly identifying the policy decisions, citizen participation can be made more effective. Second, in presenting an integrated set of planning policy statements, an official plan provides a relatively effective means of communicating information about municipal policies to citizens. In these ways official plans help reduce information cost. Third, planning policy statements may be made subject to more stringent approval requirements, thus introducing more certainty into municipal planning. Fourth, by focusing political debate on area-wide policies, the adoption of policy statements generates more consistency in planning actions, and indirectly greater certainty.

For such differentiation to be effective, the requirement that implementing bylaws conform to adopted planning policy statements is crucial. Currently, the requirement for conformity is subject to a number of exceptions which reduce the the usefulness of official plans.(14) Previously-adopted

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13 The Comay Report makes recommendations which would downgrade the legal status of official plans and, in so doing, reduce the opportunity for making this differentiation. The concerns behind the Comay committee's proposal regarding the legal status of official plans can be dealt with by other means without changing the legal requirement for conformity between policy statements and implementing bylaws.

14 In addition, the requirement only applies where an official plan has been adopted. There is no requirement that a planning policy statement be adopted prior to passing a bylaw. The Comay Report proposes (paragraph 6.9) that such a requirement be introduced.

zoning bylaws not in conformity with a newly-adopted official plan may remain in force; the information provided to citizens by an official plan may thus be highly misleading. Moreover, zoning bylaws approved by the Ontario Municipal Board are deemed by the Act to conform to official plans, regardless of whether they do or not. Removal of these two exceptions would enhance the value of official plans as policy instruments.

A planning "policy" that is too vague or too general to restrict subsequent municipal planning decisions is of no value as policy. And thus a decision that purports to be an implementing decision may not be so in fact. It is therefore necessary to require a policy to be specific about the criteria to be applied in any subsequent implementing decision; where clear guidance is not provided by previously-adopted planning policy statements, a subsequent municipal decision should be treated as a policy matter.(15) This requirement would allow municipal planning policies to be articulated in varying degrees of specifity without reducing the protective role of planning policy statements.

Making policies more difficult to change

Planning policy statements can be made more difficult to change than ordinary bylaws in a number of ways; the effect of doing so is to make the role of planning policy statements a second form of quasi-constitutional safeguard. The advantage in making planning policy statements more difficult to change than zoning bylaws (and other implementing bylaws) is that individuals applying for rezonings that are consistent with

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15 The most efficient way of implementing this requirement is to provide that grounds for appeal to the province by citizens objecting to an implementing bylaw should include not only that the bylaw does not conform to municipal planning policy statements but also that the municipal policy statement is not sufficiently precise to provide clear guidance to the local council adopting the implementing bylaw. The effect of this provision would generally be simply to encourage municipal councils to adopt whatever supplementary planning policy statements are needed to provide the necessary precision at the time the planning action is undertaken, subject, of course, to whatever procedural safeguards are applied to the adoption or amendment of policy statements.

previously adopted planning policy statements do not bear the costs resulting from the greater difficulty of changing policies. In a system in which extraordinary safeguards were to apply to the passage of every zoning bylaw, the costs of initiating a socially desirable change in land use might become unduly high.

Methods of making planning policy statements more difficult to change may include one or more of the following:

- ¶ Requiring an absolute majority of council: A normal bylaw may be adopted by a simple majority of those present. Since a quorum is generally a simple majority of the members of council, it is possible for a municipal bylaw to be adopted by little over one-quarter of the members of council. Requiring an absolute majority of council (i.e. a majority of the members of council) for adopting official plans, plan amendments, or other planning policy statements would eliminate the possibility of important planning decisions being passed in the absence of some members.

- ¶ Requiring an extraordinary majority of council: A stronger move, similar to the Illinois and Texas requirements cited in Section 2.4, would be to stipulate that planning policy statements be adopted by a two-thirds or three-quarters majority of the members of council.(16) Requiring an extraordinary majority would enhance the blocking power of significant minorities and so increase the protection available to them.

- ¶ Permitting the mayor to veto a planning policy statement adopted by council:(17) This proposal would reflect the fact that the mayor, elected in a municipality-wide election, may be especially responsive to significant minorities concentrated in a particular area within the municipality. In addition, in a fractionated region (a region containing several local governments), a mayoral veto might facilitate dealing with intermunicipal spillovers, in that mayors can most effectively carry out intermunicipal negotiations and have much better access to information than other members of council.

The most desirable alternative might be the combination of the first and third suggestions.

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16 A similar restriction has recently been adopted by the council of the City of Vancouver, though the validity and applicability of the bylaw may be open to question.

17 I am indebted to J.S. Dupré for this suggestion.

There is precedent in the current Planning Act for the suggestion that an absolute majority be required to adopt a planning policy statement. Section 12(2) of the Act now requires that a majority of a planning board be required to recommend an official plan or amendment thereof to council; this stipulation could simply be extended to the council.

Requirements for an extraordinary majority of council might be made conditional on objections of affected parties. At present, the confirmation of bylaws after the receipt of formal objections is a relatively pro forma proceeding that applies to the adoption of zoning bylaws but not planning policy statements. As noted earlier, there should be a requirement for council confirmation of all planning actions formally objected to by affected parties. Such confirmation could be required to be by an extraordinary majority (e.g. two-thirds of all members of council) if a significant number of formal objections to the action were made by affected parties.(18) Imposing the requirement for an extraordinary majority at this stage rather than when the policy is first adopted would have the advantage, first, of making the role of objections more significant at the local level and, second, of not requiring an extraordinary majority except when really needed.

In addition to more stringent voting requirements for the adoption of an official plan or a municipal planning statement, the following procedural requirements would be useful:

¶ Requiring additional public hearings: Because of the importance of policy decisions and because they will normally be less frequent than implementing decisions (such as site-plan bylaws and development agreements), it is appropriate to require an additional set of hearings on a proposed change in planning policy. Specifically, a municipality should be required to hold preliminary hearings on a policy proposal before developing final

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18 It would be necessary to define this trigger more precisely in legislation. Two possibilities are that it be some fraction (e.g. one-fifth) of the property-owners within the block or blocks directly affected by the planning policy or implementing bylaw, or alternatively some fixed number of property-owners and residents in close proximity to the area to which the action applies.

recommendations for submission to a local council.(19) The procedural rights described previously (rights to adequate notice, to information, to present briefs, etc.) should apply to such preliminary hearings as well as to the subsequent public hearings of council that would deal with the final recommendations.(20)

¶ Requiring final hearings to be held by the full council:(21) While it should generally be possible for a council to delegate the responsibility for hearings on proposed bylaws to a committee of council, delegation should not be permitted for policy statements to which significant objections are raised. On these, the full council should have to hold a public hearing. Moreover, council members should be disqualified from voting on the confirmation of a proposed policy statement if they were absent from a council hearing on the proposal.

Of these, the first is the more important. The second would apply to a public hearing of objections prior to confirmation of a planning policy statement and might be limited to cases where an extraordinary majority is required.

These additional procedural requirements would provide important further safeguards of citizens' rights and make planning policy more difficult to change. The purpose of doing so is not to preclude changes generally regarded as desirable, but to force such choices to be made more deliberately. This

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19 The responsibility for holding preliminary hearings as well as for developing the final recommendations would normally be delegated to a planning board. It should be noted that the preliminary hearing primarily serves two functions: (1) it allows concerns raised by citizens in the preliminary hearing to be taken into account in developing the recommendations, and (2) by adding a stage of public involvement before the hearing by council on final recommendations, it ensures that citizens who do not have sufficient time to make an adequate response in the first preliminary hearing have a second opportunity to intervene when the final recommendations subsequently are forwarded to council.

20 These rights would be restricted to those described previously and would not for example include rights to cross-examine municipal officials or other deputants.

21 It should be noted that this requirement is potentially arduous and could not be imposed upon all planning actions (i.e. for implementing bylaws as well as bylaws adopting planning policy statements) without seriously impeding the effectiveness of a council. However, restricting the imposition of such a requirement to the adoption of planning policy statements makes it manageable. Moreover, the impact is minimized to the extent that conflicts can be reduced in the process of developing final recommendations and responding to issues raised in preliminary hearings.

should ensure that any opposing views have had a full opportunity to be heard prior to the adoption of such a change.

4.3 THE FORM OF PROVINCIAL INTERVENTION

The need for provincial intervention to protect individual rights or minority interests cannot be eliminated, but as a general principle it should be the minimum necessary for this purpose. Political compromises on planning issues are clearly best made by local elected officials who are knowledgeable of the details of local issues and accountable to the local electorate. For this reason, provincial intervention to protect individual and minority rights should be restricted to vetoing municipal decisions.

Provincial institutions can protect in two ways. First, they can provide an objective forum. Second, they can intervene in municipal decisions in response to an appeal by aggrieved parties.

Hearing objections

A forum should be provided for hearings in which full rights of natural justice may be afforded to participants, including rights to cross-examine and be represented by legal counsel.(22) Because such hearings are neither feasible nor desirable as part of the municipal political decision process, they must occur at a higher level.(23)

Hearing objections on appeal has two important effects. First, it increases the importance of "planning evidence", the

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22 While this should apply to site-specific planning actions, it should also apply to general planning actions that have traditionally been deemed by the courts to be of a legislative rather than adjudicative nature. See *Re McMartin et al.* v *City of Vancouver* (1968), 70 D.L.R. (2d) 38. In this respect, legal precedent is excessively narrow.

23 The reasons why such hearings should not occur as part of the municipal political process have been described above in Section 3.3.

technocratic input by municipal planning officials and other professionals, regardless of the formal grounds for appeal. Second, it increases the power of vested interests which can afford to pay for effective representation. Both effects reduce the effective power of local politicians and of the citizens who elect them. Since neither effect is desirable, it is necessary to limit the role of post-decision hearings to the minimum necessary to ensure that individual rights and minority interests are not arbitrarily ignored by municipal councils.

Two alternative strategies may be followed to limit the role of provincial hearings of objections. The first is to attempt to limit grounds for appeal. The second is to focus on the disposition of the findings of the hearing agency. Given the practical necessity of providing for appeals on grounds of fairness, it is difficult to limit the grounds for objection and generally not a fruitful endeavour to define grounds for appeal in terms that both ensure fairness and exclude frivolity. Nevertheless, the onus should be on the objector to show that his objection is valid.(24)

The disposition of appeals is more susceptible of modifications that can restrict the role of hearing agencies and hence limit the undesirable effects of hearings of appeals. In the present system, the hearing agency (the Ontario Municipal Board) is empowered to make a final decision on a planning bylaw to which there is an objection, subject to appeal to the provincial cabinet. An alternative to this role is one in which the hearing agency is empowered, on finding that an objection has merit, to recommend to a municipal council that it withdraw or modify a planning bylaw. By implementing this

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24 This is not generally the case in the present system. The Ontario Municipal Board is empowered under present legislation to make a final decision (subject to appeal to the provincial cabinet) on a zoning bylaw or on an official plan bylaw referred to it by the minister, and is required in doing so to assess the expediency and necessity of the bylaw. See *Re Hopedale Dev. Ltd. and Oakville* [1965], 1 O.R. 259, 4 D.L.R. (2d) 482 (C.A.). In effect, the Board has an obligation to consider a bylaw *de novo* and hence to assess whether it has merit, alalthough the Board has often stated that it is reluctant to overrule decisions of elected councils (see e.g. *Tollefson* v *Gloucester*, 1 M.L.P.R. 11).

alternative, the function of the Ontario Municipal Board can be changed from decision-making to persuasion. Clearly the latter function, though significant, is more limited than the former.

The potential significance of a persuasive function for the OMB should not be discounted, particularly when taken in the context (discussed below) of potential further appeal to the provincial cabinet by the objector. Because the Board's hearing procedure is quite unlike that of a public hearing held by a local council, providing opportunities for careful presentation of evidence and cross-examination of witnesses not available in a council public hearing, it is entirely possible that an aggrieved party may be able to show even to municipal officials that his objection has merit. In such a case, it is clearly appropriate for the additional information and evidence presented at such a hearing, together with the Board's findings, to be submitted to the local council for their reconsideration of the issue.(25) In many cases, a finding by the Board that a decision was unreasonable will have a significant impact on the council.(26)

The primary advantage of restricting the OMB's function to hearing objections is that this would leave decision-making power in the hands of elected officials, while providing an objective, independent appeal forum. Local councillors would be able to attempt a compromise that took the Board's findings into account. Such a compromise negotiated at the local level,

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25 This proposal, together with those discussed below for appeal by the objector to the provincial cabinet from the response of a local council and the Board's recommendation, requires that an adequate record exist of the evidence and cross-examination in the Board hearing. The proposals in paragraph 10.40 of the Comay Report take care of this need.

26 Because a municipal bylaw would become official on rejection by the OMB of the objections, an objector should have the right to appeal to the provincial cabinet against a rejection of his objection by the Board. Grounds for such appeal should be limited to those listed in paragraph 10.44 of the Comay Report. In the event that the appeal is upheld by the cabinet, the Act should provide that the matter be returned to the Board for a new hearing to determine how the Board's decision should be varied in order to rectify the deficiencies successfully appealed. Rules of procedure and delegation concerning appeals to the cabinet for an order for a new hearing should be as proposed in paragraph 10.43 of the Comay Report.

if possible, is clearly preferable to one imposed arbitrarily by an external agency.

Appeals to the provincial cabinet

Nevertheless, it is necessary to provide for provincial intervention in local decisions in cases where a municipal council's behaviour is demonstrably unreasonable or unfair. Two mechanisms for this should be provided if the OMB role is restricted to a hearing and recommending function. First, in extreme cases the OMB should be empowered to recommend to the minister that he review the municipality's planning decisions to determine whether the municipality's authority should be recalled by the province.(27) Second, an objector should be able to appeal against a local council's rejection of the Board's findings and recommendations.(28)

In most cases, a local council receiving a Board recommendation for withdrawal or modification of a planning bylaw should have the final word. However, if a council does not seriously reconsider its decision in the light of a finding that its previous decision was unreasonable or unfair, the aggrieved party should be permitted to appeal to the provincial cabinet on the ground that the local council was unresponsive to the Board's findings. Such grounds for appeal to the cabinet would be considerably narrower than those on which the original appeal could be lodged with the Municipal Board; a council that could show that it had seriously considered the Board's findings and had at least partially modified its original decision in response to them should normally be able to presume that its decision will be upheld by the provincial cabinet.

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27 Provision for this would require that the Planning Act provide the minister with authority to recall planning powers delegated to a municipality; cf. paragraph 4.15 of the Comay Report.

28 The procedure governing the conduct and delegation of decisions on appeals should be as proposed in paragraph 10.43 of the Comay Report. The Act should specify that the cabinet be required to state its reason for any decision.

In order to encourage development of an appropriate compromise at the local level, the cabinet, in deciding on an appeal against a council's response to Board findings, should be empowered either to approve or to reject the council's decision but not to modify it.(29) This would put pressure on the local council to modify their original bylaw in order to reduce the risk of its being revoked by the province. In addition, by restricting the role of the provincial cabinet to a veto power, the danger of substituting distant arbitrary decisions for local decisions would be avoided.(30)

It might be argued that the submission of the OMB's findings to the municipal council followed by an appeal to the provincial cabinet would cause longer delays in the approval process. However, this should not normally be the case, particularly if the council were required to deal with the Board's findings within a reasonable period of time (say sixty days). Since the threat of an appeal to the cabinet would cause most councils to respond seriously to a Board finding of unreasonableness, it is unlikely that many successful appeals to the cabinet would be made. It is entirely possible that in most cases a final resolution of the issue would be obtained in a shorter time than would be required for a provincial decision.

In any event, even if one effect of the proposed change in procedure were a minor lengthening of the duration of the appeal process in some cases, that would be of small impor-

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29 It might however be advisable to provide that the cabinet, in thus vetoing a municipal bylaw, may authorize a municipal council to withhold a building permit for an affected development for a period of up to thirty days, provided that the municipal council within that period adopts an amended bylaw more responsive to the findings of the Municipal Board. Exercise of this power would of course be solely at the discretion of the cabinet.

30 It should be emphasized that the foregoing comments apply only to appeals by citizens or a citizen organization to the province. It is necessary for the province to be able to modify municipal planning actions where necessary to achieve the implementation of provincial planning policies; this is discussed in Section 6.4 below. The restriction of intervention for the protection of individual rights to the exercise of a veto power reflects the fact that, for this purpose, it is sufficient simply to be able to prevent an unfair or unreasonable municipal action.

tance. More important, it would be a price worth paying to make the decision process more consistent with the objectives of the appeal process: namely, to make local elected representatives clearly responsible for municipal decisions while avoiding abuses of municipal power. Providing for a provincial veto of municipal decisions ensures that an unfair or unreasonable decision may be revoked, without at the same time allowing municipal councillors to avoid the full responsibility for municipal actions by passing unpalatable decisions on to provincial decision-makers. Restricting provincial intervention in protecting individual rights to the exercise of a veto leaves municipal councillors clearly accountable for all municipal planning decisions.

4.4 SPILLOVER EFFECTS AND INTERMUNICIPAL CONFLICTS

Additional problems arise when a municipality is but one element of a region in which land uses are highly interdependent. Where jurisdiction is fractionated by the existence of multiple municipalities within a region, the institutional structure of the planning process must take interdependencies into account.

The problems that arise in this connection have been outlined in chapter 3. Where regions consist of a number of local municipalities without an upper-tier regional government, the problems are concerned with how to take local and global spillovers into account. Essentially, this requires providing for provincial resolution of intermunicipal disputes.

Dealing with local spillovers

To ensure that affected individuals in adjacent municipalities are afforded the same rights they would have if located within the decision-making municipality, the Planning Act should explicitly provide, first, that the rules of notice and provisions for citizen participation be extended to affected parties outside the boundary of the municipality and, second,

that such individuals be afforded full rights of objection and appeal to the province.(31)

It is necessary also to provide for review by potentially affected municipalites and to encourage co-operation among adjacent municipalities. Any adjacent municipality should be given notice of a potential planning action within a specified distance (say 1000 feet) of its boundary at the same time as notice is given to an affected individual. This would permit officials to consult and facilitate preparation of an objection where appropriate.(32)

This leads to the question of adjudicating intermunicipal disputes. While it would be appropriate for objections by an adjacent municipality to be heard by the Ontario Municipal Board, the appeals procedure proposed in the previous section for affected individuals would not in general be sufficient. Specifically, while Board findings and recommendations should be returned to the original council for review the council of an affected adjacent municipality should be able to appeal to the cabinet on broader grounds than were proposed for affected individuals and should further be permitted to propose modifications of the planning action. The cabinet should in cases involving the resolution of intermunicipal disputes be empowered to vary a municipal decision as well as to veto it. Most intermunicipal disputes would arise over the adoption of a planning policy statement rather than an implementing bylaw.

The role of regional governments

The creation of two-tier municipal governmental structures in most urban areas of the province, together with the

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31 It would be desirable to provide explicitly for the standing of such individuals in general terms in the Planning Act and to define minimum provisions of notice by regulation.

32 Where an adjacent local municipality is contained within a two-tier governmental structure that does not contain the municipality undertaking the planning action, the words "adjacent municipality" should be interpreted to mean both adjacent local municipalities and adjacent regional municipalities.

possibility of using county governments in a similar role in rural areas, provides an institutional means through which some conflicts between local municipalities may be resolved without requiring provincial intervention. This may occur in two ways: first, by the adoption of regional planning policy statements for the areas adjacent to boundaries between local municipalities within the region and, second, by involving the upper-level government in the adjudication of disputes between local municipalities.(33) In addition, two-tier regional governments can deal with global spillover problems.

The adoption of regional planning policy statements dealing with boundary areas is a potentially productive means of avoiding conflicts between local municipalities, provided that such planning policy statements are consistent across municipal boundaries and are obtained through consultation and negotiation with affected local municipalities. In developing regional policy statements for boundary areas, the regional government can establish and co-ordinate spontaneous joint planning efforts among neighbouring local municipalities, thus heading off intermunicipal conflicts.

Upper-tier intervention in boundary areas can be of particular importance in avoiding gross inconsistencies where local boundaries are particularly arbitrary. Nevertheless, it may not be acceptable to all affected parties, and it is consequently still necessary to provide for objection and appeal to the provincial government against regional planning actions both by affected individuals and by affected local municipalities.

Because of the interdependence of regional planning issues, a regional plan (and corresponding capital budget for major service and transportation investments) would be an invaluable instrument through which to coordinate local planning actions and to deal with global spillover effects.

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33 In what follows, "regional planning policy statements" denotes planning policy statements adopted by the upper-tier municipality in a two-tier regional government. The words "regional municipality" will be used to refer to the upper-tier government; "local municipality" will denote the lower-tier government.

Except through the institutional structure of a regional government, it has proved impossible to develop effective regional plans.

For regional plans to be implemented, it is necessary to define the relationship between regional planning policy statements and local planning actions. By enhancing the quasi-constitutional status of local official plans, it would be possible to confine most intermunicipal conflict to policy statements, thus eliminating interventions over implementing bylaws that conform to a local official plan. In addition, this approach eliminates the need for an upper-tier government to intervene in detailed planning decisions made by local municipalities provided that such local planning actions conform to a local official plan.(34)

The approval of regional plans

There are essentially two ways in which lower-tier governments can effectively serve local minorities. One is to permit local municipalities to appeal to the provincial cabinet against a regional planning policy statement adopted by the upper-tier government, with the provincial cabinet having the power to vary or veto regional planning policy statements (this approach is followed in the present system). The other is to provide for additional approval requirements at the regional level that serve to increase the power of local municipalities, and so force regional planning decisions to command a broader base of support. These two methods are of course not exclusive.

There are many ways in which approval requirements for regional planning policy statements might be made more stringent. One proposal (analogous to the proposals for approval of local planning policy statements described above) would be to require that provisions of a regional planning policy statement

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34 Partly for this reason, both the Robarts Report (recommendation 11.14) and the Comay Report (paragraphs 8.41 and 8.42) conclude that regional councils need not have direct zoning or development review powers.

which apply to a local municipality be confirmed by an extraordinary majority of the regional council if objected to by an extraordinary majority of the members of the council of the affected local municipality.(35) In effect, this proposal would permit a local municipality that is relatively unified in opposition to a policy to make it more difficult for that policy to be adopted by the regional council. The proposal is analogous to the Illinois and Texas provisions requiring an extraordinary majority of council to adopt planning actions to which there are significant local objections, except that in this case the initiation of such a requirement would be vested in a local council.

Whether stipulations such as these should be implemented in the Planning Act is partly a question of the extent to which protections for spatially-concentrated minority interests should be built into legislation or left to be implemented at provincial discretion. At the moment, there are significant restrictions on the ability of a regional council to override positions strongly held by local municipalities, but these restrictions are imposed by the province unsystematically in response to appeals made to the Board and cabinet by the local municipalites. The possibility of provincial intervention to modify or veto a regional council decision on appeal by a local municipality has encouraged regional municipalities to seek compromises. Such compromises in effect reach a consensus position that overcomes strong opposition of local municipalities within the region.(36)

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35 In both cases, the requirement should be defined as some fraction, such as three-fifths or two-thirds, of the members of each council, not of those present. The requirement is meant to be additional to the requirement for a full majority of members of council proposed in section 4.2 as a normal requirement for the adoption of planning policy statements.

36 It should be noted explicitly that compromise and consensus are desirable. It is sometimes incorrectly assumed that mutual accommodation and compromise are unfortunate, in that they result in the dilution of regional planning. (See for example the comments of some regional officials cited in paragraphs 8.47 and 8.50 of the Comay Report). Such an assumption overlooks the importance of recognizing that planning decisions are inherently political (not technical) in substance and that it is important to allow intensities of preference to be reflected in political decisions.

The implementation of a requirement for an extraordinary regional majority to overrule opposition by a correspondingly extraordinary majority of a local council would not remove the need for provincial intervention in intermunicipal disputes. Indeed, it may be advisable that the Municipal Board should be required to hear the objections of the local municipality and report its findings and recommendations both to the local council and to the regional council, and to provide as well that the local council's invocation of a requirement for an extraordinary majority only be applicable to the regional council's confirmation of its decision subsequent to receipt of the Municipal Board's findings. A number of alternative procedures might be followed in implementing a requirement for an extraordinary majority; the point here is simply that implementation of one of these alternatives would build additional pressures for compromise into the regional planning structure and so provide more effective protections for minority interests.

What is being proposed here is not that local municipalities should be able to veto regional planning policy statements, but rather that it should not generally be possible for a policy strongly opposed by a lower-tier municipality to be adopted by a simple majority of a regional council. If there is concern over the effect of the foregoing proposal on the effectiveness of upper-tier planning, it would be preferable to reflect this concern by providing that a regional council may, by decision of a simple majority of members, appeal to the province to override the opposition of a local municipality in cases where the regional council cannot muster an extraordinary majority of members in support of the policy to which the local municipality objects. The effect of this modification of the proposal would be that the province would potentially be faced with three different categories of conflicts over regional policies between upper-tier and lower-tier municipalities: an objection by a simple majority of a lower-tier council; an objection by an extraordinary majority of a local council against a policy confirmed by an

extraordinary majority of the upper-tier council; and an appeal by a simple majority of an upper-tier council against the opposition of an extraordinary majority of a lower-tier council. Presumably the moral position of the appellant council would be relatively weak in the first and third categories of appeal. The modified proposal would accordingly tend to focus the provincial conflict-resolution role on decisions in the second category.

PART TWO

PROPOSALS FOR REFORM

"Le mieux est l'ennemi du bien."
[The best is the enemy of the good.]

-- Voltaire, Dictionnaire Philosophique

The specific reforms proposed by the Comay and Robarts reports deserve both criticism and applause. Many of their recommendations would be beneficial and should be implemented. But other proposals imply fundamental changes which reflect a choice of strategy that may have perverse and unintended effects and are unlikely to result in a more smoothly functioning system.

Because of the importance of the efficiency of the municipal decision process, some general proposals advanced by the Robarts commission, which would reduce provincial control of municipal administration, are dealt with first, in chapter 5. The specific proposals in both reports regarding the development of municipal planning policies are evaluated next, recommendations for relatively autonomous municipalities in chapter 6, and those aimed at municipalities co-existing within a region in chapter 7. The

planning problems of the Metropolitan Toronto region addressed by the Robarts commission are treated with the latter. The implementation of planning policies through municipal regulations is the subject of chapter 8, which evaluates proposals for improving the efficiency of land use controls.

The underlying problems that have to be responded to in developing an institutional structure for the planning process have been described in preceding chapters. In evaluating the changes proposed by the two reports, it is useful to keep Voltaire's maxim in mind. His maxim can be applied in two ways: first, in recognizing the dangers of overemphasizing the weaknesses of the proposed changes and, second, in recognizing the importance of preserving good features of the present system. Improvements are not necessarily the outcome of dramatic reform. Neither will they occur without reform.

Chapter 5

The municipal decision process

The operation of municipal councils has been hampered by provincial restrictions. The most important recommendations of the Robarts commission are aimed at eliminating most of these restrictions. These are described in the first section. The Robarts recommendations on this subject, of course, are applicable to municipalities in general, not merely to those composing Metropolitan Toronto.

An aspect of municipal decisions which is of particular significance in planning is the determination of capital budgets. Procedural requirements for municipal capital budgeting and financial planning are discussed in the second section.

5.1 MUNICIPAL ADMINISTRATION

Municipal government is currently impeded by the incomplete legal powers of municipal councils.(1) The following restrictions on municipal powers are particularly important: over-detailed statutory restrictions on the exercise of municipal authority; lack of general powers to legislate; lack of powers to delegate; and fragmented responsibility for municipal decisions exercised by provincially-mandated special-purpose bodies. The effect of these restrictions is to inundate municipal councils with trivial decisions and preclude more effective municipal organization.

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1 The problems are discussed in detail in a study commissioned by the Royal Commission on Metropolitan Toronto. See Jaffary and Makuch, *Local Decision-Making and Adminstration*, 1977, especially chapters 2 and 5.

The recommendations of the Robarts commission on municipal decision-making and administration,(2) if implemented generally, would permit Ontario municipalities to be more effective in two ways. Municipal councils could spend more time on policy decisions, delegating implementation responsibility to standing committees of council, special-purpose bodies, or municipal officials as determined by the municipal council. Administrative decisions could be expedited by reducing the extent to which they are processed by the municipal council. These recommendations deserve to be implemented for municipalities across the province.

The Robarts commission's proposals respecting powers of delegation of authority (recommendation 6.3) are of particular importance in the planning field, and what may be delegated needs to be carefully defined. In general, such delegation by municipal councils should only be allowed where the council has adopted policy statements that are sufficiently precise to provide clear guidance for delegated decisions. Moreover, any party affected by a planning decision made by a delegated authority must be able to appeal the decision to the municipal council. The Robarts commission's recommendation 6.3 should be modified to this effect.(3) While it may be preferable for an agent of council to develop policies on matters for which authority has been delegated, the proposed modifications would not prevent an agent from proposing policies (or policy revisions) to the council for adoption.

The Robarts position that municipalities be given relatively unlimited powers of delegation is extremely important, since without them a municipal council cannot reorganize its

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2 The recommendations are contained in chapter 6 of the royal commission's report (recommendations 6.1 - 6.4).

3 It would also be appropriate to change recommendation 6.3(c) to provide that delegated authority continue until revoked, but to provide further that municipal councils be required to review all delegated powers within periodic intervals (e.g. by the fifth anniversary of such delegation or renewal thereof).

procedures. The Robarts recommendations closely follow those of an extensive and comprehensive staff study where their merits are extensively reviewed.(4)

5.2 PLANNING AND CAPITAL BUDGETING

A second area of excessive provincial supervision is in the setting of municipal capital budgets. The Municipal Act requires a municipality to set its property tax rates at a level sufficient to pay for all current expenses, including payments required by contractual obligations on debt issues, thus ruling out municipal deficit financing of current services.

This provision has clearly helped maintain the financial health of municipalities, and is generally supported. In effect, it is a "quasi-constitutional" restriction on municipal decision-making authority effectively implementing a generally desired objective. The problems associated with this restriction arise from the manner in which it is implemented. It is of course necessary to ensure that capital spending is not diverted to spending on current services.(5) At present this is accomplished by requiring approval by the Ontario Municipal Board of any action to be financed by the issuance of debentures.

The OMB, in approving capital budgets, must now endorse both the desirability of a specific project and the financial feasibility of the intended borrowing. That is rather more than is needed to ensure municipal financial solvency. It is not necessary to approve specific projects, only the total

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4 See Jaffary and Makuch, *Local Decision-making and Administration,* 22-32.

5 The financial problems of New York City arose in part because of the imaginative and entrepreneurial accounting practices through which current expenditures were transformed into capital items.

capital spending by a municipality.(6) The Robarts commission therefore proposes (recommendation 10.5) that the Municipal Board's function with regard to approval of capital spending by municipalities be limited to ensuring that total borrowing by the municipality is known and is within acceptable limits related to the ability of the municipality to repay such borrowings; borrowing is for capital projects only, and is not used to finance current expenditures; the term of debentures to be issued to finance capital projects is not longer than the life of the assets to be created; and the level of municipal capital expenditure financed in part by borrowing is consistent with "clearly stated provincial policy concerning capital expenditures".

The Robarts Report proposes that this be implemented by the approval of annual capital budgets, and endorses (p. 203) the more detailed suggestions for implementation made by Jaffary and Makuch. It implicitly endorses the Jaffary-Makuch proposal that municipalities be empowered to change the allocation of capital funds among projects so long as the total capital budget did not exceed approved limits.(7) These proposals would provide adequately for provincial supervision of municipal financing without requiring detailed provincial approval of specific captital projects and would implement provincial objectives more efficiently.

The Robarts Report also recommends (10.6) that the Ontario Municipal Board not hear objections to municipal capital projects, which should be a responsibility of the municipal councils themselves. This proposal is analogous to the recommendation that the OMB not hear citizen objections to municipal

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6 As noted in Jaffary and Makuch, *Local Decision-making*, 57-9, it would also be necessary to ensure that approval of total capital spending is effective. To do so, Jaffary and Makuch propose (1) that municipal auditors be required to certify to the Municipal Board the capital projects on which moneys had been spend, the funds actually expended, and the expected useful life of the capital assets resulting from such expenditures, and (2) that the Municipal Board be required to review and approve such reports.

7 See Jaffary and Makuch, *Local Decision-making*, 59.

planning decisions except where municipal procedures have been deficient.(8)

The serious problems noted earlier associated with the removal of restrictions on municipal decision-making authority on important planning actions apply as much to muncipal capital projects as to changes in zoning bylaws. This is particularly the case with regional capital expenditures on major transportation and service facilities, which have a significant effect both on land values and on the feasibility of local planning policies. It is accordingly necessary here as well to provide for an independent review of individual objections and also of objections by other municipalities. However, the Robarts Report's recommendation (10.6) would not allow for such review.

Adopted planning policy statements may make the necessary appeal process more efficient. If a planning policy statement justifying a capital project has been adopted and does not need to be reviewed, it should be possible to confine the range of objections. This would focus the resolution of conflict on the policy decision. Accordingly, objections by individuals and municipalities to proposed capital expenditures should be heard by the OMB. The Board decision should be based on whether, first, the proposed capital project is consistent with planning policy statements adopted by the municipality and, second, the municipal planning policy statements relevant to the proposed capital project provide clear policy justification for the proposed project. Objections would therefore be based on a municipality's failure to meet these criteria. Procedures for dealing with OMB findings and recommendations should be the same as proposed in the previous chapter for planning policy statements.

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8 The proposals on the OMB's role in hearing objections to planning and regulatory decisions are discussed in chapter 6.

Chapter 6

Planning in autonomous municipalities

An autonomous municipality is a local jurisdiction in which regional and municipal boundaries effectively coincide, so that there are no regional or local spillover effects. This implies that there is only one single-tier municipal government in the region. The problem of unrepresented external interests may therefore be ignored, and we shall deal with questions of policy instability, internal minorities, information costs, and individual rights. In addition, the potential for conflict between local decisions and provincial policies cannot be ignored even for autonomous municipalities.

The severity of these problems depends on the size and complexity of the area as well as on the municipality's rate of growth. For this reason, the institutional structure ought to allow planning processes to vary between municipalities. This issue and related proposals in the Comay Report are discussed in the first section.

A number of proposals in the Comay Report would downgrade the role of official plans, while others, made in both reports, would introduce legal requirements for citizen participation and a closer relationship between official plans and implementing bylaws. The role of the official plan is discussed in the second section; the plan initiation and decision process within a municipality is described in the third section; and the question of external review of official plans is treated in the last two sections.

Throughout this chapter, discussion will be focused on the planning process as reflected in the adoption of planning policy statements. It is assumed that the hierarchical structure of planning and regulatory instruments will be continued, so that the objective of reform is to make improvements to this

structure. A discussion of regulatory instruments and of the process through which planning policies are implemented is postponed to chapter 8.

6.1 FLEXIBILITY FOR A VARIETY OF PLANNING NEEDS

Municipalities vary considerably in complexity of economic and social structure, in size, in the degree to which congestion brings global externalities, in rate of economic growth and consequent pressure for development, and in many other respects. The planning problems faced by a small town in Bruce County are very different from those faced by a larger but relatively slow-growing city such as Kingston: the planning context for Kingston is different from that in a fast-growing city of approximately the same size, such as Guelph; and the planning problems in all these jurisdictions are in turn very different from those in a municipality such as Metropolitan Toronto which is a component of a large, rapidly growing, urban megalopolis.

These differences are not adequately reflected in the current institutional structure. The Planning Act as traditionally interpreted has required official plans to be comprehensive in scope and coverage, regardless of whether such comprehensive planning is needed as a guide for municipal action. On the other hand, since municipalities are not required by the Planning Act to adopt official plans, they often make land use decisions without them. In effect, the planning process varies between municipalities only in whether or not an official plan has been adopted.

The Comay Report recommends that municipalities be permitted to adopt either comprehensive official plans or municipal planning statements on specific issues. It further proposes (paragraph 6.9) that the adoption of planning policy statements should be a prerequisite for the exercise of

municipal land-use control powers.(1) Not only would these proposals be flexible in application but in preventing change in the absence of a plan they would also protect individuals against arbitrary or inconsistent municipal decisions. Such protection is not provided by the present Planning Act in cases where no plan has been adopted.

This flexibility is in some respects further enhanced by recommendations for minimum rural zoning standards (paragraph 4.18) and for a provincial rural consent policy (paragraph 4.20 and chapter 5). While these minimum standards are primarily to ensure that provincial land use policies are implemented, they would also allow a municipality to refrain from planning for rural land without subjecting such land to a total land use freeze. In effect, such restraint on the part of the municipality would mean *pro tem* agreement with the development rules specified by the provincial minimum standards.

Further flexibility would be gained through provisions (paragraphs 4.14 and 4.15) for excluding individual municipalities from the general stipulations proposed for the delegation of planning authority and for recalling delegated authority where necessary.

In general, making mandatory the adoption of planning policy statements (whether comprehensive or limited) before enacting land use bylaws would increase the importance of municipal planning in areas where it is actually needed, while avoiding both "needless" planning and unplanned decisions.

Minimum control standards for rural development imply substantial provincial intervention in rural planning. This reflects the provincial interest in controlling urban sprawl and preserving agricultural land as well as making possible reasonable consistency across the province.

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1 The Comay Report further proposes a number of transition measures for land-use decisions required before municipal adoption of a plan or policy statement. These proposals, contained in paragraph 6.10, should be sufficient to deal with any transitional problems that arise.

6.2 THE ROLE OF OFFICIAL PLANS

As noted in previous chapters, the crucial role of official plans is in making planning decisions difficult to change, reducing uncertainty for property-owners and residents and imposing quasi-constitutional limitations on municipal planning actions. Official plans serve a number of other purposes too. As policy statements, they facilitate efficient communication with the public and focus debate over that policy. To be effective, planning policy statements must restrain subsequent municipal decisions, a restraint currently exercised partly through Section 19(1) of the Planning Act, which provides that all municipal bylaws must conform to the provisions of an official plan.(2)

While the Robarts commission implicity assumes the present set of planning instruments (including official plans) to be continued in their current functions, the Comay Report recommends that the legal status (and hence function) of official plans be changed. It also proposes changes in the scope and content of official plans.

The planning function of official plans

As noted above, the Comay Report proposes that municipalities be empowered to adopt planning policy statements

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2 As noted in Section 4.2, two defects in the current Planning Act make this conformity less than general. (1) This requirement only applies where an official plan has been adopted, and there is no requirement that an official plan be adopted prior to passing a bylaw; and (2) there is no requirement for conformity between previously approved bylaws and a subsequently adopted official plan. The first of these defects would be remedied by the Comay proposal (paragraph 6.9) that municipalities be required to adopt planning statements before any development control bylaw. The second could be remedied by a provision that all development control bylaws be brought into conformity with any newly adopted planning statement. To avoid misunderstandings it should be stipulated that such a provision would not imply that uses and densities permitted on zoning bylaws be identical to those envisaged as long-term goals in planning policy statements, but rather simply that such divergencies be explicitly recognized and provided for in planning policy statements.

dealing with particular issues without at the same time adopting a comprehensive municipal plan. Specifically, the report recommends (paragraph 6.8) that

> A municipality wishing to exercise planning authority need not necessarily adopt a municipal plan, but no statutory [planning] authority should be exercised under the Act unless the municipality has formally adopted a municipal planning statement relating to that activity. Where more than one planning statement has been adopted, a municipality's various planning statements should be consolidated periodically so that the public may be aware of the municipality's total planning policies at any given point of time.

This proposal has the very significant advantage of permitting municipalities to adopt no more planning policy statements than are actually required by the issues facing them. Such a planning instrument is far more flexible than the present comprehensive official plans in meeting the great diversity of planning needs across the province, particularly in small communities.(3) At the same time comprehensive planning does have advantages. It allows potential inconsistencies in municipal policies to be debated. Futhermore, because most municipal decisions regarding public works, transportation investments, and land use are undertaken independently of each other, it is useful to have some comprehensive review and discussion of their joint effects.

Municipalities undertaking major public works or facing substantial pressures for development should accordingly be encouraged to adopt comprehensive municipal plans. But it would be difficult if not impossible to define conditions in the Planning Act under which the adoption of a comprehensive

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3 The proposal has implications for large cities that have adopted official plans as well as for small communities that have not. As one instance, it would permit a municipality with a generalized Part I official plan to articulate a specific policy in detail for an area without adopting a comprehensive Part II district plan. In the City of Toronto, for example, several attempts in the 1960s to adopt Part II plans that detailed the boundaries of low-density residence areas were rejected by the province on the ground that they were insufficiently comprehensive. The Comay proposal would permit such plans and other ad hoc policies to be adopted by a municipality.

plan would be required. Nevertheless, municipalities should at least be compelled to ensure either that new policies are consistent with previous ones or that the previous ones are amended. Furthermore, policy inconsistency should be grounds for objection to a planning policy statement by any interested party. In this connection, it might be convenient to retain the name "official plan" to designate a comprehensive municipal plan, and to use the term "official plan statements" to refer to any planning policy statements to which this consistency requirement is applicable.(4) The terminology is obviously less important than the requirement.

The proper scope of a comprehensive official plan has been discussed in a number of briefs commenting on the Comay Report's proposals.(5) The Report has appeared to some observers to downgrade general social and economic objectives and to overstress the importance of "purely physical" planning. For some, planning should be broad enough to deal with all municipal responsibilities, including the provision of human services.(6) Others see litle value (and indeed real disadvantage) in including objectives in municipal planning statements that are not capable of municipal implementation; such statements may mislead more than they guide. The Comay Report's view is dominated by the second concern. As it notes (paragraphs 2.33 to 2.35):

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4 The Comay Report recommends (paragraphs 6.7 and 6.8 that the name "official plan" be dropped because of its connotation of provincial approval. The substantive aspect of this issue (namely provincial supervision and approval of planning policy statements) is discussed below. Regardless of that issue, the term "official plan" has a widely recognized meaning as a comprehensive set of formal planning policy statements guiding municipal actions, and there is merit in keeping existing terminology.

5 See for example Bureau of Municipal Research, "Changing the Planning Act: Risks and Responsibilities", *Topic No. 3*, November 1977, 23-7.

6 Provision for human services planning was for example included in early conceptual versions of an official plan for Metropolitan Toronto. Cf. *Metroplan: Concept and Objectives*, May 1976, chap. 9. However, on the advice of the province, a human services plan has not been included in the draft official plan currently before Metro Council. The Robarts Commission (Vol. 2, 302) commended the inclusion of broad planning objectives for human services in the Metro official plan but noted that it is difficult to develop planning policies that are sufficiently specific to have meaningful implications.

The purposes of municipal planning are related to and are therefore circumscribed by the available instruments and their capabilities. These instruments are largely concerned with the regulation of land use, the control of physical development, and municipal programs for the provision of public works, facilities, and services ... Municipal planning should not be expected to take in goals and objectives that cannot realistically be achieved with the available tools ... But municipal planning should be expected to take account of all the appropriate concerns affecting the life of the community.

The Report therefore expects municipal plans to be primarily concerned with the physical development of a community, but proposes that municipalities be required to have regard for social, economic, and environmental consequences of municipal policies and programs.(7) In general, this position is sensible.

It may be useful to differentiate between planning policy statements that have clear implications for municipal bylaws regulating private land use and policies meant primarily as general guidelines and objectives for financial planning and for the provision of human services. Perhaps policy statements concerning financial policy and the delivery of human services should not be part of a comprehensive official plan, which could be limited to policy statements governing municipal land use bylaws and guiding public works. Were this done, planning policy statements concerning financial priorities, taxing policy, and the provision of human services could be adopted as separate municipal planning statements. Such differentiation would help communicate to citizens the difference in legal status between land use policies and other municipal planning statements.(8) It would also reconcile the two views of the proper scope of municipal plans.

Projecting the fiscal implications of municipal planning

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7 See paragraphs 2.34-5, 6.20-2, and 6.28. The Report similarly recommends (paragraph 6.24) that financial planning be not explicitly included in official plans but that municipalities be required to review periodically the financial feasibility of actions projected in planning policy statements.

8 The legal implications of the planning policy statements should be clearly labelled through a method established by regulation. This would ensure that differences in legal status are communicated to citizens. The terminology used in this report (see Section 1.5) is one way of reflecting these differences.

policies (including those underlying the provision of human services) is an important component of municipal planning. While financial projections should not be assumed to constrain future councils, and so should be differentiated from official plan statements that do impose such constraints, they should be a required part of the background analysis provided in staff reports to a council adopting or reviewing a comprehensive official plan.

Problems in requiring conformity to planning policies

Official plans are difficult to change under present procedures, partly because of a number of differences between the approval process for official plans and that for zoning bylaws. While this difficulty has improved certainty about the future for politicians, citizens, and investors, the potential for excessive rigidity has had a number of undesirable side effects, including a tendency to exclude important policies from official plans when it is expected that it may subsequently be desirable to alter them. This tendency has been particularly evident in the case of public works, where the exclusion of policies and priorities has been more the rule than the exception.

The Comay Report is strongly critical of the present legal status of official plans, partly because of these side effects. Its concerns are expressed by the following statement (paragraph 6.32):

> The legal status afforded by Section 19 [of the Planning Act] produces misleading public expectations that the municipality must act in a positive way to carry out the plan, which is not the case. It can lead to inflexible plans that have to be tailored to legalistic considerations, often at the expense of substantive planning considerations. The conformity provision often serves to turn the municipal plan into a legal instrument rather than a planning instrument ... The inherent inflexibility of the official plan may lead councils to exclude from the plan important policies or programs that they may want to be able to alter later as circumstances dictate, without going through a cumbersome amendment process. Because the plan should, in a formal sense, contain only provisions for which the legal conformity of subsequent actions can actually be

determined, significant planning formulations are often kept out of the plan, or are expressed as bland "motherhood" generalities.

These effects are partly unavoidable and inherent in any instrument that is to function as a constraint on actions of subsequent councils.(9) Nevertheless, the undesirable side effects of inflexibility could be ameliorated in two ways: by refining the wording of policy statements to allow greater flexibility in interpretation in pre-specified circumstances, and by modifying the legal requirement for conformity as it applies to particular types of municipal actions. The latter will be discussed first.

It should be noted in passing that the Comay Report's proposal (paragraph 6.9) to make the adoption of planning policy statements governing municipal actions a pre-condition for such actions will serve to encourage specificity in planning policies, assuming, of course, that the requirement can be enforced.(10)

The legal status of plans

The Comay Report recommends that Section 19 of the Planning Act be deleted and municipalities be required merely to "have regard for" their formerly adopted planning policies. This proposal would remove the strict requirement for conformity now contained in the Planning Act.

An important question is the precise legal meaning of the

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9 In particular, it is unrealistic to condemn an official plan for being a legal instrument. In the main, where the tailoring of planning statements to legal considerations occurs "at the expense of substantive planning considerations", such conflict is evidence either of incompetent legal drafting of the statements or of poor communication between planners and legal counsel, rather than being inherent in the role of the planning policy statement. Similarly, it is not the wording of Section 19 of the Planning Act which may produce misleading public expectations, but rather the existence of the plan itself. Section 19 clearly defines conformity to a policy to be a necessary but not sufficient condition for municipal action; such action in turn regulates but cannot initiate the private decisions that are required to produce developments anticipated in an official plan.

10 See the discussion in Section 4.2 above. As noted there, the Planning Act should provide that planning policy statements are sufficiently precise to guide local councils undertaking specific planning actions.

words "to have regard for". The Comay Report submits (paragraph 6.34) that "It is an accepted legal convention to require that public bodies have regard to specific policies. Our proposed requirement is capable of legal interpretation and enforcement". These statements, while true, are not very meaningful. A municipal council could simply take note of the provisions of an official plan while passing a bylaw that contradicted them.(11) To "have regard for" planning policies imposes no legal constraints on the ability of a municipality to pass any bylaw it likes, provided that in doing so the council takes note of and considers previously adopted planning policy with which the bylaw is in conflict. This proposal would therefore seriously weaken the protective role of official plans by eliminating the need for consistency with previously adopted policies.

While the Comay Report's proposal to eliminate Section 19(1) is too extreme, some of the undesirable side effects of the conformity provision would be ameliorated by modifying it. Specifically, land use planning policy statements that control land use bylaws (such as zoning and other development control actions) could be legally differentiated from other policies. While land use decisions and bylaws should have to conform to planning policy statements, other actions of local municipalities (including local public works and the provision of services) might only be required to have regard for planning policies.(12) This would permit planning policy statements on transportation improvements, parks programs, or other public works to be interpreted as guidelines rather than as directives, ending fears of excessive inflexibility arising from a

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11 I am indebted to Stanley Makuch for providing me with the results of his review of British and Canadian jurisprudence on this issue. The British cases are concerned mostly with the question whether a list of items which a decision-making body is to have regard for preclude such a body from having regard for other matters; the courts have generally held that such a listing is not exclusive and the listed matters are not necessarily of greater importance than a consideration which is not specified.

12 Because of additional problems that may be caused by public works undertaken by a regional municipality in a two-tier regional government, stricter conformity to adopted planning policies should be required for regional municipalities. This is discussed in the next chapter.

requirement for strict conformity to planning policy statements in all matters. Planning actions should have to be consistent, of course. Where a municipal decision on local public works or services does not conform to previous adopted policy statements, the Planning Act should stipulate that all affected policies should be reviewed and (where necessary) amended. The requirements for notice that would apply to an enabling official plan amendment should also apply to a municipal decision to undertake a public work which does not conform to adopted planning policy statements.(13)

The legal definition of the official plan as a planning instrument also needs further refinement. The Comay Report points out (paragraph 6.31) that the legal status of official plans is incomplete; they do not restrict the provincial and federal governments in carrying out their own works, and they are further qualified by Section 35(28) of the Act. While the powers of the federal government are constitutionally entrenched, and thus not subject to limitation by either direct or delegated exercise of provincial authority, the same argument does not apply to provincial works. The Comay Report proposes (paragraghs 4.25-7) that provincial crown rights be subject to the jurisdiction of municipal planning instruments under the Planning Act, except in the case of location-specific provincial facilities (such as highways or correctional institutions) where a particular provincial program requires the establishment of such facilities in certain locations. This proposal would for the most part be consistent with current practice and should be adopted. However, the Act should provide for an OMB hearing at which the merits of the

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13 This would ensure that, at a minimum, adopted planning policy statements would provide some protection against an arbitrary council decision to undertake a public work that does not conform to such statements. This proposal represents a compromise in that it would not subject a non-conforming local public work to all of the procedural requirements of an official plan amendment but would nevertheless ensure public knowledge of a potential council decision to undertake a non-conforming public work prior to the decision being made. It would also provide the basis for allowing objections to non-conforming capital projects, as proposed in section 5.2 above.

location-specific facilities can be assessed vis-à-vis local concerns.

Section 35(28) of the Act specifies that any zoning bylaw approved by the Ontario Municipal Board is automatically deemed to be in conformity with the official plan. But the requirement for conformity of planning actions to previously adopted planning policy statements should apply to the Board as well as to municipal councils.(14) Consequently, even if the current approval process were continued, Section 35(28) should be deleted from the Act.

In addition, municipalities should be required to bring zoning bylaws and other development control bylaws into line with any existing or newly adopted planning policy statement.(15) At present, a previous zoning bylaw may remain in force even though it is totally inconsistent with both the long-term and short-term objectives and policies stated in an official plan.(16) Such anomalies, which can make an official plan highly misleading, should not be permitted.(17)

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14 This provision is often viewed as simply a necessary device to prevent excessive delays that may result from appeal to the courts. Nevertheless, since costs may be awarded against unsuccessful appellants, appeals to the courts under Section 19(1) subsequent to a Municipal Board decision are unlikely to be made frivolously. While it might be appropriate to provide that such appeals must be made within a limited time period following Board approval of a bylaw, it would seem unwarranted to entirely exempt Board decisions from judicial review.

15 This proposal was previously made by the 1973 Ontario Economic Council review; see Bacon et al., *Subject to Approval*, 118. As noted earlier, this requirement would not require that zoning bylaws be identical to long-term planning objectives, but rather that the official plan recognize such differences explicitly and (where appropriate) specify criteria to be applied in evaluating applications for rezoning.

16 An example in the City of Toronto was an area designated as a "stable low-density residential neighbourhood" in the 1969 official plan but zoned for high-rise apartments. The anomaly was not eliminated until after a number of new high-rise buildings were constructed.

17 It would also be necessary to require that municipalities not be permitted to include in planning policy statements any provision evading the intended effect of the proposed requirement that zoning bylaws conform to planning policy statements. Sections 8.5 and 8.6 of the City of Toronto Part I Official Plan provide an example of such "hidden loopholes". As noted elsewhere, the official plans of most Ontario municipalities contain a similar provision; cf. Greenspan and Vaughan, "The Citizen and the Planning Law", *Plan* (II: 2, 1971) 132.

Improvements in planning instruments

Under the present Planning Act, restrictions of use and density specified in an official plan are interpreted literally in deciding whether or not a zoning bylaw conforms.(18) Moreover, an official plan traditionally specifies densities and uses for each area it covers. Such provisions clearly provide exact limits for zoning bylaws.

This degree of specificity is not necessarily appropriate in all areas. In areas likely to be redeveloped, it may be difficult to predict development on particular sites. The uniform specificity now normally required in official plans introduces an undesirable rigidity in certain areas.

Although not discussed by the Planning Act Review Committee, refinements in official plans may improve their efficiency as planning instruments and allow flexibility where it would not cause uncertainty. Several refinements might be devised, but one would be to allow municipalities to designate areas in which the council may modify the zoning bylaw to permit a development which does not strictly conform with the official plan.(19) (Such designation should be through a planning statement adopted as part of the official plan.) In such a case the Planning Act should stipulate that full opportunity must be given for public review of the reasons for the proposed deviation. The procedures suggested in paragraph 6.35 of the Comay Report would do for this purpose. Where a municipal official plan designates an area as one in which such deviations can occur, it should normally specify a limit on the sum of such deviations. In this way the design, wording, and

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18 The way in which the requirement for conformity has been interpreted by the courts has been discussed in Section 4.1 above.

19 More specifically, the proposal is to permit municipalities to designate areas in which zoning and other development control bylaws adopted by council need not conform to adopted planning policy statements in all particulars, provided that such bylaws are in general conformity with planning policy statements and provided that deviations from stated policies are subject to public review. In effect, this proposal would permit municipalities to designate areas to which the proposals in paragraph 6.35 of the Comay Report would apply.

implementation of official plans could be used to specify "redevelopment areas" where policies should be interpreted in a general as opposed to specific way, in circumstances where flexibility is appropriate and agreed to in advance.(20)

Another refinement worth considering is one that would provide an expedited approval process for site-specific official plan amendments that conform to an adopted planning policy statement that authorizes them. Doing so would provide an intermediate process which would be more stringent than a rezoning but less stringent than a normal official plan amendment. This could be accomplished by requiring that site-specific official plan amendments be subject to the same procedural requirements within a municipality as any other official plan amendments but be subject externally only to the same review requirements that would apply to a rezoning.(21) "Special" site-specific official plan amendments would have to conform to the provisions of an adopted planning policy statement that allows for the passage of site-specific plan amendments and specifies the criteria to be applied in evaluating applications for such amendments.

An example of a situation in which the foregoing refinement would be useful is provided by a proposal in the City of Toronto to permit assisted or senior citizen housing at

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20 It may be questioned whether such flexibility is consistent with using the official plan as an instrument to obtain certainty. In response it may be said that the need for certainty is not constant, and since the designation of redevelopment areas is through an official plan provision there is subsequent certainty as to the areas in which the official plan is flexible. In addition, the designation of such an area would be subject to the same procedural safeguards as the adoption of any other official plan provision.

21 The external review requirements for a rezoning, described in section 8.2 below, specify that objectives are to be evaluated with particular regard for whether the planning action conforms to adopted planning policy statements. The criteria specified in such policies must be sufficiently precise to provide clear guidance in evaluating the site-specific decision. This can be done by providing for objections on the grounds that the "umbrella" policy statement to which the site-specific amendment conforms is imprecise or deficient in some important respect and should therefore be reviewed.

above-normal densities in low-density residence areas. Because the policy is tailored to specific types of sites and may not be appropriate in many areas, it is undesirable to allow rezonings generally. On the other hand, providing that they be dealt with as site-specific official plan amendments can unnecessarily delay projects which are acceptable to the surrounding neighbourhood. The proposal for an intermediate process for site-specific plan amendments which conform to an enabling planning policy statement would provide the appropriate tradeoff between protection and flexibility.

Monitoring and review

Periodic review of planning policies is obviously desirable. Presumably it can be undertaken voluntarily at any time by a municipality. However, it is necessary to provide an opportunity for citizen-initiated review and for provincial initiation of such a review in order to incorporate the effects of changes in provincial policies.(22) Monitoring procedures able to trigger municipal review would be desirable too.

The Comay Report recommends (paragraph 6.41) that a mandatory review of planning policies be required at least once in the lifetime of every municipal council. But there is a danger that frequent mandatory reviews might well simply become formalities. If, instead, official plans contained provisions for the monitoring of planning policies, defining when policies were to be reviewed, a serious review would be more likely. (The most important reviews of planning policies will naturally be undertaken voluntarily by municipal councils in response to a perceived inadequacy with political consequences.) Planning policies should obviously also be reviewed whenever a public work is undertaken that does not conform to previously adopted planning statements.

In addition, citizens should be able to initiate a review of planning policy statements. The Planning Act now provides

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22 Provincial initiation of such a review is discussed in Section 6.5 below.

that citizens may appeal to the Ontario Muncipal Board from a municipal decision rejecting a request for amendment of a planning bylaw.(23) However, this provision is often interpreted to refer only to site-specific planning actions, and it ought to include explicitly petitions on planning policies of broader application. Provision must be made for hearing appeals that reviews required by planning policy statements have not been initiated.

The foregoing proposals should apply only to the initiation of a review, not to its outcome. A municipal decision not to change existing planning policy statements should not be subject to appeal except on the grounds that proper procedures were not followed or that advice or information provided to the municipal council in the course of its review was incomplete or incorrect.(24) In the event of a finding by the Municipal Board in favour of an appellant on these grounds, the matter should be returned to the municipal council with a direction that the issue be reviewed again by the council in the light of proper procedures or additional information.

This proposal would ensure that responsibility for the initiation of a change in municipal planning policies is clearly vested in municipal councils, thus eliminating one of the more flagrant ways in which municipal authority may at

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23 A citizen's ability to obtain a hearing of a request for a change in a planning bylaw is now provided for by sections 17(3) and 35(22) of the Planning Act. The Robarts commission proposed (recommendation 11.7) that any citizen be entitled to initiate an OMB hearing on the question whether consideration of such a request is being unduly delayed, and further that the OMB should be given the power to order a municipality to decide on such a proposal within a given deadline. While the thirty-day deadline contained in the current Act is not only unrealistic but also inconsistent with proposals in both reports to provide for adequate notice of the municipal decision to all interested parties, the provisions suggested by the Robarts commission are both flexible and reasonable. The Robarts proposal would be preferable to the Comay recommendation (pages 163, 172) that the thirty-day deadline be changed to forty-five days. Were a fixed deadline adopted, sixty days would be more realistic, assuming citizen participation.

24 The latter ground for appeal should be interpreted as described in paragraph 10.15 of the Comay Report. Findings and recommendations by the Municipal Board should be processed in the same way as described earlier in Section 4.3.

present be evaded. Under Section 17(3) of the Planning Act, an applicant for an official plan amendment which is not approved by a municipal council within thirty days may appeal to the minister to refer the application to the Ontario Municipal Board. On hearing the application, the Board may decide in whatever manner it sees fit without further reference to the municipal council.(25) This procedure, through which an applicant seeking a change in planning policy may bypass a municipal council, should be eliminated.(26)

Increasing the information value of official plans

One of the attributes of official plans is their potential for organizing and communicating information on municipal planning policies. This would be achieved by the Comay Report's proposal (paragraph 6.8) for periodic consolidation of adopted planning statements, which is of particular importance if separate municipal planning statements are to be adopted. Municipalities should have to provide citizens on request with

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25 The present legislation is particularly deficient in that it is possible for an applicant to submit a pro forma application to a municipal council to obtain its rejection, and then submit a fully developed proposal to the OMB panel hearing the Section 17(3) appeal. In such cases, the Municipal Board may decide an application which has de facto never been submitted to the municipal council. Several very unfortunate precedents in this respect have been established in the current OMB hearings on the City of Toronto's Central Area Plan. At a minimum, Section 17(5) should be changed to ensure that an applicant may only be heard regarding the precise proposal submitted to the municipal council.

26 The rationale for Sections 17 (3-5) is that it is necessary to allow for appeals from municipal decisions which do not give serious consideration to an application for a policy amendment. In part, this concern would be met by the preceding proposals to permit a citizen to appeal against council decisions made on the basis of incorrect or inadequate information or advice. More fundamentally, however, it should be up to a municipal council to decide whether a policy should be changed. In this respect a policy change should be sharply differentiated from a rezoning application which seeks to implement a previously adopted policy, since in the latter case it is legitimate for a citizen to presume that an application which conforms to the policy will be favourably considered by council. No such presumption should exist with respect to an application to change a policy.

an up-to-date complete listing of all planning policy statements adopted by the municipal council, including short descriptions, so that citizens can easily ascertain which ones are of interest to them. Municipalities should also be encouraged to organize such descriptive material to provide an easily used brief guide to the planning statements.

As planning policies become more sophisticated, policy statements become more complex. Moreover, because the policy statements are legislative instruments, their wording is inevitably legalistic. Municipalities should therefore be encouraged to provide supplementary explanations that translate the official policy statements into everyday language and describe their purpose.

6.3 THE PLANNING PROCESS WITHIN A MUNICIPALITY

Aside from a requirement that planning boards hold public meetings and the regulations for notice established by the Ontario Municipal Board, there are few legislative or administrative requirements governing the participation of interested parties in the local planning process. Both the Comay committee and the Robarts commission made recommendations designed to formalize council requirements for notice to all parties affected by a proposed planning action and for an effective hearing of citizens' objections and concerns by municipal politicians. These recommendations would result in a substantial improvement in the planning process.

Citizen participation and rights of notice

The Comay recommendations (paragraph 9.13) would provide for a clear definition of right of citizen participation and adequate notice. It is proposed that procedures should be stated in the form of minimum requirements in provincial regulation, and that the rights of notice and objection should apply to unincorporated citizen organizations such as

ratepayer's groups as well as to affected individuals.(27) The report proposes also that municipal public hearings, the availability of information on proposed planning actions, and other related matters be subject to minimum requirements stated in provisions of the Planning Act and amplified by regulation.

These proposals would in many jurisdictions simply codify procedures that already exist in large part. Such codification would serve a valuable purpose in entrenching these procedures as legislated minimum requirements for notification, hearing, and participation in all municipal planning actions. Moreover, in municipalities where such procedures do not now exist, the result would be a significant increase in effective involvement by interested parties at low cost. For example, two practising municipal lawyers have commented,

> The distinction between giving notice before and after [a] zoning bylaw has been passed is of the utmost practical significance because the neighbor who, ignorant of the rezoning, does not object until after the actual bylaw has been passed by the municipality, usually finds that he is too late to make his voice heard effectively at the municipal level. Municipal councils or their appropriate committees do read the written objections and often will hear oral presentations based on them, but in the experience of the writers, councils are rarely moved by these objections to amend the bylaws which they have passed after much painstaking deliberation and expert advice.(28)

The various procedural rights which should be entrenched as legislative requirements have been described in section 4.2, a listing that corresponds to the Comay Report's proposals (paragraph 9.11 and 9.13-20) with the following exceptions:

¶ While the Comay Report's proposals would require circulation of notice on site-specific proposals, and would require officers of registered citizens' organizations to

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27 While not explicitly stated, the Comay report's proposals for the establishment of minimum standards of notice would presumably include the provision of notice to affected parties in adjacent municipalities. This ought to be explicitly stated both in the Planning Act and in provincial regulations.

28 Greenspan and Vaughan, "The Citizen and the Planning Law", *Plan* (II:2, 1971) 129-30.

be notified of matters in which such organizations have indicated an interest, they do not comment on the length of time between delivery of notice and the holding of a public meeting.(29) It is important to recognize that time is required by citizens to prepare a submission for such public meetings if they so choose, and that the length of time required is generally longer for citizens' groups than for individuals.

¶ As noted in Section 4.2, it would be feasible (and desirable) to have municipal officials respond to specific questions, though not to cross-examination, in public meetings.(30) Such a practice should be stipulated in legislative provisions or in regulations specifying minimum citizen rights.

¶ Notice of decisions of council, describing the decision along with procedures for objection and appeal, should be provided in the same way as for notice of proposals. Where objections to a decision are filed with the municipality, the council should be required to reconfirm its decision after consideration of the objections.

¶ Because it was judged outside the committee's terms of reference, the Comay Report does not make an explicit recommendation that meetings of Council or of council committees be held in public when dealing with planning matters. Nevertheless, such a requirement should be legislated.

The general effect of the Comay proposals would be substantial improvement in the protection of citizen rights of participation in the planning process.

The extent to which it is feasible for a municipal hearing to accord "rights of natural justice" to participants has already been discussed. In this connection, the Comay recommendations (paragraphs 9.14 and 9.15) that a municipal council be required to hold a formal hearing before making a planning

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29 Presumably, this is one of a number of matters which would be dealt with in regulations. The proposals in paragraphs 9.11-20 of the Comay Report deal primarily with what should be required by legislation.

30 Such a requirement would implicitly provide a means by which planners may be required to state whether and how particular concerns were taken into account in designing a proposed policy statement. The failure of many planners to feel any obligation to acknowledge whether citizens' comments were taken into account in producing a plan has been noted in one of the background papers prepared for the Comay committee; cf. Bousfield, "Citizen Participation in the Preparation of Municipal Plans", 14.

decision is clearly meant to provide an opportunity for all interested parties to make oral or written submissions to the council, but not to imply that any interested party should have the full rights of cross-examination normally accorded to participants in administrative hearings elsewhere. For such hearings to be effective, it is necessary to recognize that since participation in an extensive sequence of meetings is not feasible for most citizens no citizen can be allowed to monopolize the time available for submissions.(31)

Beyond the entrenchment of these minimum procedural rights in the Planning Act, the Comay Report proposes (paragraphs 6.17 and 9.5) that municipalities be required to establish detailed procedures of citizen participation in the formulation of planning policy statements and that these procedures would themselves be established in the form of a planning policy statement. They would accordingly be subject to provincial scrutiny on being adopted and could be amended only in accordance with the procedures they define. Changes in municipal procedures in dealing with planning policies would thus be subject to all the procedural safeguards applying to any other official plan amendment.

Delegation to special-purpose bodies

Both the Robarts Report (recommendations 11.8 and 11.9) and the Comay Report (paragraphs 5.4 and 5.15) propose that special-purpose bodies such as planning boards and committees of adjustment should be established at the discretion of local municipalities and hence should not be mandatory. Allowing this local option would enable such special-purpose bodies to

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31 This will normally be accomplished through the procedural rules adopted by the municipal council. Legislative requirements for a formal public hearing by council on proposed planning actions should therefore not imply that participants have the right of cross-examination or the right to make oral submissions of unrestricted length.

vary among municipalities in a way that reflects the municipal differences in the planning context.(32)

Planning boards can serve a number of useful functions both as supplementary channels of communication between citizens and council and in holding preliminary hearings on planning proposals. In many cases, such bodies can refine planning recommendations closer to a consensus among conflicting interests before they reach council. Moreover, special-purpose boards can float trial balloons to which citizens can further respond when recommendations are heard by council.(33)

Although planning boards have fallen into academic disfavour over the years (on the ground that they may diminish the accountability of elected representatives), they continue to be viewed by residents' groups and businessmen as an important protective feature. Planning boards give citizens two opportunities to influence important planning decisions: first before the planning board and again later before council. At a minimum, this lengthens the time during which citizen interaction can develop and organize more effective responses. In addition, hearings held by a planning board are also often longer and more detailed than what can be done by a council that is inundated by other business. Beyond this, the role of a planning board complements that of council in providing a cadre of citizen members of the planning board who can be knowledgeable advisers both to elected representatives and to fellow-residents. So long as the municipal decision-making

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32 While implicit in the Comay Report's recommendations (paragraph 5.2), it should be explicitly provided in the Planning Act that the role, function, and procedures of special-purpose bodies should be specified by a municipal planning policy statement, so that any change is subject to all of the safeguards normally applicable to the adoption of such statements.

33 Curiously, the Comay Report also recommends (paragraph 5.3) that council should not have the power to assign to a planning board the authority to hold public hearings. The recommendation is presumably meant to imply that a council (or committee thereof) should be required to hold a public hearing on a proposed planning action before a decision by council, not that a council should be precluded from requiring a planning board also to hold public hearings.

power in municipal planning actions is clearly vested in council, the existence of an advisory planning board can only be advantageous.

Since these advantages may be risked by making the existence of planning boards a matter of local option, the merits of the Comay proposal are debatable. It would be preferable to continue a legal requirement for planning boards but to clarify their function. If their existence is made a local option, legislation should also ensure a continuation of the preliminary hearings now undertaken by planning boards.

The recommendations of both the Comay and Robarts reports would clarify the relationship between special-purpose bodies and councils in planning matters and ensure that elected local councils have full responsibility and authority in planning actions.(34) In effect, special-purpose bodies would recommend, not decide, and, in cases where decision-making powers are delegated (as in committees of adjustment), full rights of appeal to the municipal council would be provided.

Particular problems arise concerning land severance consents, now administered either by municipal committees of adjustment or by county land division committees. The Comay Report proposes (paragraphs 5.8 and 5.12) that municipalities be required to appoint committees of adjustment to deal with minor zoning adjustments, but that municipal councils should have the option of deciding whether to delegate severance consents to the committee of adjustment or to assume consent-granting powers directly. In addition, it proposes (paragraph 5.14) that such committees be required to adhere to consent policies established by the municipal council. In dealing with rural consent procedures, the Comay Report essentially supports the present system of county land division committees. The committee's primary recommended change is that the Planning Act

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34 These proposals include elimination of the anachronistic two-thirds requirement of Section 17(2) of the Planning Act, which serves a protective function that would be better provided by other quasi-constitutional protections. The requirement for an extraordinary majority of council is better triggered by the nature of the matter being decided (or by objections of affected interests) than by failure to conform to a planning board's recommendation.

require such committees to take account of the planning policies of local municipalities within their jurisdiction.(35)

In general, the Comay Report's proposals on municipal planning organization seem worthy of support. However, its proposals regarding planning boards should be modified. At a minimum, the three qualifications noted in the foregoing comments should be reflected in any legislative changes.

Additional requirements for adopting planning policies

Most of the restrictions which currently make official plans difficult to change occur in the provincial approval process. As argued earlier, while official plans should be more difficult to change, the "constitutional safeguards" should not take the form of detailed provincial review, but would be better built into the decision process at the local level.

The Comay committee does not propose additional constraints on the process by which planning policy statements are adopted, in part because of its ambiguity over the value of a hierarchy of planning instruments. This ambiguity in turn reflects a concern that overemphasis of the role of policy statements may undermine the opportunity for effective citizen participation in the municipal planning decisions that actually affect them. As the Comay Report very correctly points out (paragraph 9.7),

> It is the application of general planning policies on the ground, in the form of specific subdivision plans say, which will give many people a real sense of how they may be affected by the policy. It would not be proper to circumscribe their rights to express their views at this stage.

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35 The Report proposes (paragraph 5.15) that land division committees be required to have regard for the relevant planning policies of affected local municipalites, and that local municipalities should retain the right to appeal to the OMB against committee decisions to which they object. While it might seem better in many cases to require that decisions of such committees conform to planning policy statements adopted by affected local municipalities, the rural severance problem is complicated by the necessity of conforming also to minimum provincial standards as well as to policies that may be developed by councils of county or regional governments. Accordingly, the Comay Report's proposal should be adopted.

Moreover, individuals affected by an implementing decision from which they were excluded also may not have participated in and may not even be aware of previously adopted planning policies. As the Comay Report emphasizes (paragraph 9.6), this problem is accentuated by household mobility:

> As matters stand, particularly in newly developing areas, the persons likely to be affected by specific planning proposals may not be the same as the persons who were involved in the consideration of the original planning policies. We believe it would be unfair for new arrivals to be deprived of the right to express their views on matters of direct importance to them.

Both these concerns are relevant in assessing the role of planning policy statements, though they have similar implications for the use of general zoning bylaws.(36)

The Comay Report's conclusion that citizens should not be excluded from participation in municipal decisions (such as subdivision approvals or site-specific rezonings) which are made by a municipal council in implementing a previously adopted planning policy is quite correct. Policy statements are essentially enabling instruments (particularly under the Comay proposals requiring the adoption of policy statements before undertaking a planning action), and their adoption should not be viewed as doing more than specifying the general guidelines for and constraints on implementing decisions. It would clearly be incorrect to assume that affected citizens should not participate in deciding how to implement general policies.(37)

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36 These concerns may be adequately dealt with in built-up areas only by treating any significant redevelopment projects as requiring the approval of council. Strictly speaking, this would require the use of a development permit system for all projects which would result in a developed density significantly above the present developed density of a site or of neighbouring areas, together with a base zoning system to provide for minor redevelopment that is approximately the same density as the existing developed density. However, such a system is de facto now utilized in many areas which are zoned at a level assumed appropriate for development of individual small lots, but where the official plan allows higher densities to be permitted on application of an owner (usually after an assembly). In undeveloped areas, such concerns are of course now dealt with by requiring subdivision approval as well as conformity to a zoning bylaw.

37 These issues are discussed further in Section 8.2 below, which deals with the process by which implementing regulations are adopted or amended.

Nevertheless, it does not follow that the adoption or revision of planning policies should not be subject to more stringent requirements. The position taken in this paper is that all municipal planning actions should be subject to the minimum procedural requirements recommended by the Comay Report to ensure citizen participation but that additional procedural safeguards should be applied when planning policy statements are adopted. The reason for proposing additional safeguards is primarily to allow the enabling instruments to be made more difficult to change, thus giving communities greater certainty about the range of planning actions that may be easily undertaken by future municipal councils.

At a minimum, it would seem appropriate to provide that significantly more than one-quarter of the elected members of a municipal council should have to approve the adoption or revision of a planning policy statement. (Because a quorum of council is now a bare majority of the elected membership, it is possible for a council decision to be adopted by a simple majority of this quorum.) More stringent requirements (such as requiring a simple or extraordinary majority of all elected members of council) have been proposed in Section 4.2.

While the limiting role of planning policy statements should be reflected in more stringent voting requirements, it is also important to recognize in legislation the particular importance of providing for citizen input in the development of planning policies. The Robarts commission suggests (recommendation 7.1) that municipal councils be given powers to experiment with a variety of ways of involving citizens in development of policy; this proposal in part reflects the widespread recent development of informal participation procedures by local municipalities. Effective participation means involvement in the development of proposals, rather than merely the right of objection.

Holding additional preliminary hearings on proposed planning policy statements would encourage such involvement. Two hearings should be needed for any official plan amendment: a preliminary one prior to developing final proposals and a final one by council. Councils should have the authority to

delegate responsibility for preliminary hearings to planning boards.(38) Naturally the same minimum requirements for notice, conduct of hearings, and availability of public reports should apply to such preliminary hearings as apply to council hearings prior to a vote by council.

As noted earlier, the existing requirements for council confirmation of a zoning bylaw to which formal objection has been made should be extended to planning policy statements. The requirements for notice prior to decisions does not eliminate the need to notify affected parties of their rights of objection to a decision that has been made, and such objections should be reviewed by council to determine whether any new considerations have been raised. Moreover, a requirement for an extraordinary majority of council to adopt a planning policy statement could be made applicable to the confirmation of the policy rather than its initial adoption. It could also be made conditional on the submission of a significant number of objections (e.g. by more than twenty individuals) so as to be triggered only when there is demonstrated opposition by a significant local minority. Where a council is required to confirm a planning policy statement by an extraordinary majority, it should also be required to hold a public hearing at which objectors can speak.

All this emphasis on process may try the patience of

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38 This procedure is already followed in a number of municipalities. For example, in the City of Toronto, the Comay Report's recommendations (as modified by the above-mentioned proposal) are already followed, in that the planning board holds public meetings to hear submissions on both preliminary and final planning proposals which involve general official plan amendments, with committees of council holding a further public hearing on the resulting recommendations for official plan amendments. On site-specific plan amendments, only two public meetings are generally held: one by the planning board and one by a committee of council on the planning board's recommendation. Provision of notice and rights of deputants at such meetings correspond to what is recommended by the committee. Planning board public meetings on preliminary proposals are held in the affected area.

In contrast to this procedure for official plan amendments, hearings on amendments to the zoning bylaw are held only by a committee of council. In confining the role of the planning board to making policy recommendations and reserving for city council and its committees all hearings on site-specific zoning bylaw amendments, the City of Toronto council has adopted a division of responsibility which has increased the productivity of both the council and the board.

participants. However, many objections needing only minor changes in a policy are often better dealt with by the municipal council rather than in a more lengthy OMB hearing. On balance, an investment of time on the municipal level can speed the entire process.

6.4 EXTERNAL REVIEW OF OBJECTIONS TO PLANNING POLICIES

As noted at the beginning of this report, the desire to reduce the extent of provincial intervention in municipal planning decisions was a primary motivation of both the Robarts and Comay reports. Their shared premise is summarized in the following statement by the Robarts commission:

> Because land-use planning requires choices to be made from among alternatives, and because there is frequently no objective way to decide which alternative is the most desirable, it is an essentially political process. In the Commission's view political choices should be made by elected bodies who should be free to make or change policy within the framework of law and the rules of natural justice. If such decisions are initiated, reviewed, or approved by another level of government, such action should be limited to protecting the interests of that level and should not constitute a second-guessing of policy on strictly local matters.(39)

Both reports make clear that provincial interests include the protection of citizen rights as well as the implementation of provincial planning policy.(40) However, they also recognize that it is in practice exceedingly difficult to separate citizens' perceptions of fairness from value judgements about policy, particularly where such citizens have a vested interest in the outcome of a municipal planning decision, and that it is important to ensure that concerns over the potential substantive fairness of municipal decisions are not used as an excuse to substitute provincial decision-making for local decision-making on strictly local matters.(41)

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39 *Report of the Royal Commission on Metropolitan Toronto*, vol. 2, 219.

40 The Comay Report defines its concept of provincial interests in paragraph 4.2.

41 See for example paragraphs 2.22 and 2.23 in the Comay Report.

The purposes served by provincial intervention are quite different in the case of intervention to protect citizen rights than when required to secure provincial planning objectives. Provincial review for the latter purpose is discussed separately in Section 6.5. Citizens' rights are defined to include all the protections of individual and minority interests shown to be desirable in chapter 3. Procedurally, provincial intervention to protect these rights is assumed to be triggered by objections by citizens (including unincorporated associations), so that the effectiveness of such intervention is largely determined by the quality of the process by which such objections are heard.

The degree of intervention required to defend citizens' rights

The province, rather than deciding municipal planning policy in order to protect citizens' rights, should merely prevent municipal actions that transgress those rights. The distinction is subtle and crucial. In the present system the province takes final responsibility for all decisions, treating the decisions of municipal councils merely as recommendations to the province. Provincial intervention against abuse of municipal authority takes the form of simply eliminating such authority.

The Robarts Report recommends limiting provincial intervention on behalf of citizens' rights (recommendation 11.5) to situations where a municipality has failed to follow "appropriate procedures according to rules of natural justice". It further proposes (recommendation 11.6) that a decision to intervene (and a decision on the form of such intervention) should be made by the Minister of Housing after a hearing of a citizen's objection by the Ontario Municipal Board. Such a sharp restriction on the circumstances for provincial intervention would not satisfy the legitimate concern of citizens to ensure fairness in municipal decisions and procedures. In short, citizens' rights (as generally perceived) would not be adequately protected by the Robarts Report's proposal.

The Comay Report adopts a vaguely defined position that might be interpreted as similar either to that recommended by the Robarts Report or to the present system in its effect. This is a compromise position whose exact nature is uncertain and left for future governments to determine through administrative action. Nevertheless, by making possible the gradual administrative restriction of provincial intervention it would at least be preferable to the present sytem. Only if narrowly interpreted would the proposals of the Comay Report restrict provincial intervention to preventing actions that transgress citizens' rights. But narrowly interpreted they raise other problems.

Both reports restrict provincial interpretation by limiting the range of citizen objections that may initiate it. That strategy is likely to be less effective than an alternative approach: limiting what the province may do in response to an objection. Limiting provincial intervention in protecting citizens' rights to the exercise of a veto (as proposed in Section 4.3 above) would prevent the substitution of provincial decision-making for municipal choice, while at the same time ensuring that unfair or unreasonable municipal actions may be revoked.

The role of the Ontario Municipal Board

The key function currently played by the Ontario Municipal Board has been heavily criticized and strongly defended. To protect a citizen against arbitrary action by a local council, it is widely felt to be important to provide an opportunity for objections to be heard by an independent tribunal with power to modify political decisions which are "unreasonable and unfair". At the same time it is also widely recognized that the role of the Board in intervening in local planning decisions can be arbitrary, members of the Board are not accountable for their decisions, and Board procedures give more power to vested interests than to ordinary citizens.

Both aspects of the Board's role in local planning are

well illustrated by the role it has played in the protracted development (since 1972) of a new official plan and zoning bylaw for the central area of the City of Toronto. Given the exhaustive nature of the process and that the plan proposals have directly or indirectly been a central issue in three successive municipal elections, it is difficult to justify any vesting of decision-making powers on this subject in the Municipal Board.(42) Moreover, most citizens and citizen organizations that participated in the protracted political debates are effectively excluded from participating in the Board's hearing. On the other hand, the potentially large redistributions of wealth involved in such a political action should not be effected without providing an opportunity for serious adjudicative review in a forum in which the city's advisers and officials can be cross-examined.

A third, indirect aspect of the Board's role in local planning is that it can encourage the development of a compromise between competing interests. Indeed, the most important role played by the OMB in the development of the City of Toronto's official plan may well turn out to be, not its decisions, but its effect on the development of the recommendations adopted by council before being submitted to the Board. The fact that the Board's role was potentially important and the plan would be subjected to exhaustive scrutiny resulted in a better research and planning effort on the city's part. In addition, in imposing a potential constraint on the effective decision-making power of the city council, the Board's role

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42 The inappropriateness of vesting such power in the Municipal Board after such prolonged and intense political review at the municipal level is further enhanced by the Board's willingness in this instance to consider and approve applications for site-specific official plan amendments (relative to the old as well as new official plan) that have not been submitted in detailed form to the City of Toronto council and without notifying neighbouring property owners of the specific nature of the application. The effective opportunity for arbitrary exercise of decision-making power by individuals who are not accountable to any electorate can only be termed extraordinary; the fact that this opportunity has been exercised on applications never even seen by the City of Toronto council is from a process viewpoint incredible. The procedure followed by applicants which creates this loophole in the process has been discussed earlier.

encouraged a political compromise between the development industry and residents' groups. That compromise is likely to be firmer than decisions made without the Board's shadow. If so, the Board has played a useful role.

Both the Robarts and Comay reports call for a substantial modification of the role of the OMB. The Robarts proposals (recommendation 11.5) would confine grounds for objections by private citizens and organizations to an apparent failure by the municipality to follow normal procedures which violate "rules of natural justice".(43) An appeal would be possible where a municipal council refused to hear an interested party or violated requirements for notice: it would not be possible on grounds that the decision was incorrect, inappropriate, or "unfair". In the case of the Toronto central area official plan, there would have been no procedural grounds for appeal, and so no valid cause for hearing objections, had the Robarts recommendations been applicable.

The Comay Report proposes (paragraphs 10.9 and 10.14) that the present procedure of a Board hearing followed by a provincial decision should be continued only in cases where objections are made on grounds that "council's behaviour in reaching or failing to reach a decision was unreasonable or unfair".(44) This ground for appeal is both less limited than that proposed by Robarts and also less clear. It is possible that "unreasonable or unfair behaviour" could be interpreted either broadly, so that no objection now made to the Board would be precluded by these grounds, or narrowly, which in

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43 The Robarts Report notes (p. 220) that under the general power of delegation which it proposes (recommendation 6.3), a council could assign responsibility for holding hearings to an appointed body or hearing officer, which would report findings and recommendations. While implying (p. 104) that such hearings would be conducted in accordance with procedural rules of natural justice, municipal councils would be guided but not constrained by the findings and recommendations of hearing agencies.

44 The process by which this procedure is implemented would also be modified. The role of the Municipal Board would be redefined as one of making recommendations to the provincial ministry, which would in all cases make the final decision, rather than the present one of the Municipal Board making a decision that is subject to appeal to the provincial cabinet.

practice would not be much different from the "natural justice" grounds favoured by Robarts. Were the broad definition of "unfair and unreasonable" adopted, the role of the Board would be little affected; were the narrow definition assumed, substantial litigation might ensue.(45)

The Comay Report also proposes (paragraphs 10.9, 10.15, and 10.16) that aggrieved citizens should be able to appeal to the Board on the grounds that a council acted on the basis of incomplete or inadequate information or advice. However, in this case the disposition of the appeal would differ. Where the Board finds an appeal that a council's decision is made on the basis of inadequate information, the matter would be returned to the council for reconsideration in the light of the specific information or advice which it was found to lack. Further appeal could then only be made on the grounds that council's behaviour, in reconsidering the matter, was unreasonable or unfair.

Assuming a broad interpretation of "unfair and unreasonable behaviour"--an assumption implicit in briefs on the Comay report(46)--most objections would normally be filed on such grounds, in that the final decision would then be made by the provincial government. The Board's role would be changed by its redefinition as an appellate rather than decision-making body. However, the restructuring of the Board's role as one of reporting findings and recommending the form of a decision to the minister (rather than making a "final" decision subject to increasingly frequent appeal to the provincial cabinet) would likely have little effect on the practical functioning of the process, in that the actual sequence and nature of adjudication, bureaucratic advice, and political decision

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45 Although the Board would not be making a decision that is reviewable, precedent established in the case of *Chadwill Coal Co.* v *Treasurer of Ontario* (1975), 1 M.L.P.R. 25, implies that its decision over what it can consider on appeal is reviewable by the courts.

46 See for example the brief submitted by the Municipal Law Section of the Canadian Bar Association (Ontario), 20-5.

would be little changed.(47)

The Robarts and Comay proposals for the role of the Municipal Board, though differing substantially, are both unsatisfactory. The former are excessively narrow, precluding aggrieved citizens or citizen organizations from objecting to municipal planning decisions perceived to be unfair or unreasonable. By contrast, the Comay committee's proposals are too weak (assuming a broad interpretation of "unfair and unreasonable behaviour") and do too little to correct the potential for arbitrary provincial intervention into municipal decisions that is inherent in the current system.

The proposals advanced in Section 4.3 would confirm the role of the Municipal Board as a hearing and recommending agency, as proposed by both Comay and Robarts, without either restricting grounds for appeal to the Board or leaving decision-making powers in the hands of provincial officials. It would thus permit any objection to be heard, but would leave the responsibility for all aspects of a municipal decision clearly vested in the elected municipal council. In this respect the proposals made here are similar in intent to those made by the Robarts report. Ample protection of citizen rights would be provided by enabling aggrieved citizens to appeal to the cabinet to veto municipal decisions that do not have adequate regard for a Municipal Board finding of undue transgression of individual rights or minority interests.

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47 Nevertheless, this proposal has been subjected to sharp criticism. In their brief the Municipal Law Section of the Bar Association (21) comment as follows: "The effect of the recommendation of the Committee, in all cases of dispute, would be to transfer the decision-making power on arbitration from the Ontario Municipal board to a group of civil servants, the advisors to the Minister of Housing. We see this as a shifting of the power of decision from a forum which is open, public, and governed by the rules of fair play, to a forum where final recommendations made to the Minister are done so *in camera* ... Conflict resolution should be determined impartially, by experienced adjudicators in a public forum and on the merits, where justice can be seen to be done." These comments underplay the actual importance and processing of appeals to the cabinet from Municipal Board decisions in the present system, as well as ignoring the impossibility of defining "the merits" of an issue independently of value judgements that are inherently political, not administrative, in nature.

Municipal Board procedures

Redefining the OMB as an appellate agency has an important procedural implication. Because its role would be confined to hearing the merits of objections raised on appeal, the onus would clearly be placed on appellants to show that their objections have merit. In this respect the comments in the Comay Report (paragraph 10.13) on the importance of ensuring that the Board not be held responsible for municipal decisions should be emphasized and supported.(48)

The reorientation of Board hearings from evaluating the merits of a municipality's decision to assessing the validity of an appellant's objection should expedite them. In addition, it would be necessary to ensure that approval delays resulting from the scheduling of Board hearings are not caused by trivial or frivolous objections. To this end, the Comay Report proposes (paragraph 10.38) that the Act should require all appeals to the Board to be accompanied by written reasons for the objection. Regardless of whether the role of the Board is changed, this proposal should be adopted. In addition, the Board should be given the power to decide on the basis of the written reasons for objection whether to grant a hearing.

Demanding written reasons for an objection not only helps rule out frivolous appeals but also may speed the hearing of serious objections. To facilitate the preparation of a municipality's defence against an objector, the latter, before a hearing, should have to provide the Board and the defending municipality with a brief stating the detailed grounds for objection and listing any facts or findings of municipal officials which are in dispute. Any new facts or findings to be presented in evidence by the objector should also be described in the objector's brief.

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48 At present the Municipal board, in examining municipal decisions referred to it, must evaluate whether each decision has merit and so must proceed *de novo,* ignoring what has occurred at the municipal level except insofar as it is introduced as "planning evidence" by the municipality.

There would be reason to discourage the introduction into into a Board hearing of facts or findings not previously submitted to the municipal council prior to its decision. Because objectors may have insufficient time under the notice provisions discussed in Section 6.3 to assemble a complete defence of their position before public meetings are held by council, it would be inappropriate to forbid the introduction of new material in a subsequent Board hearing. However, the allocation of more decision-making power to municipal councils would encourage potentially aggrieved citizens to introduce as much evidence on their behalf as possible before the initial decision by council, rather than "saving" evidence for a Board hearing. In addition, the introduction of new evidence by an objector should be made grounds for referral of the matter back to the municipal council for reconsideration in the light of such evidence.(49) Where new evidence deemed material by the Board is introduced and the hearing is continued, the Board should be required to find that council was provided inadequate information, so that the matter is referred back to the council.

In assessing the merits of citizen objections, the Board should be required to have particular regard for whether the appellants are able to show

- that the council, in adopting a planning policy statement, did not follow proper procedures as defined by provincial regulations and municipal planning policy statements;

- that the council was given incomplete or incorrect information or advice before adopting the policy;(50)

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49 More specifically, the Board should be given the power to rule that where new evidence introduced by an objector has an important bearing on the matter, the matter should be returned to the municipal council for reconsideration before proceeding further with the hearing. Where this occurs, the hearing would be adjourned for a period sufficient to permit the municipal council to deal with the matter. This would allow participants in the hearing to avoid incurring costs that might be made unnecessary by the municipal council's reconsideration in the light of the new evidence.

50 This should be interpreted as described in paragraph 10.15 of the Comay Report.

- ¶ that the policy adopted by council is inconsistent with clearly established provincial policies or with regional planning policy statements;(51)

- ¶ that the policy is inconsistent with other planning policy statements adopted by council, as amended; or

- ¶ that the policy would result in an undue transgression of minority interests or individual rights that is not offset by a clear public benefit.

Such requirements would generally limit the jurisdiction of the Board in the way intended by the Comay Report without restricting the grounds for appeal. Moreover, since they guide but do not strictly constrain the Board, they leave room for favourable consideration of exceptional appeals which may not fit neatly into one of the categories.

The role of the minister and the cabinet

In the schema proposed by both reports, provincial decisions on appeals by citizens would generally be made by the Minister of Housing or by the cabinet on the basis of a report from the Ontario Municipal Board.

The present system has increasingly come to resemble these proposals. With growing frequency, OMB decisions are appealed to the cabinet, and the cabinet modifies or rejects them. Accordingly, a criticism of the proposals is that, contrary to what the reports imply, they would not result in effective change in the role of the minister and cabinet in dealing with appeals heard by the OMB.

The Comay Report does propose that, where the Municipal Board finds in favour of an appellant on the basis of the council having received incomplete or incorrect information or advice, the matter should be returned to the council for reconsideration in the light of the additional information provided to the Board. The municipal decision made subsequent to such reconsideration would then be treated as a new decision, to

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51 The relationship between regional and local planning policy statements in two-tier municipal governments is discussed in the next chapter.

which affected parties might object on all grounds other than the adequacy of information received by the council.(52) This proposal should be supported and further applied to cases where the council did not follow proper procedures.(53) In other cases involving appeals on substantive grounds, the disposition of a Board finding in favour of an objector should allow for restricted provincial intervention on behalf of the objector.

In providing for such intervention, the findings and recommendations of the Municipal Board should not go to the minister and cabinet directly or in all cases. Rather, they should go back to the municipal council, as proposed in Section 4.3. The minister and cabinet should then only examine matters appealed to the cabinet by citizens with respect to whether the municipality's response to the Board's recommendations failed to have serious regard for the Board's findings. On matters raised in citizen appeals which do not also affect provincial interests, the cabinet's powers should be confined to vetoing or upholding a municipal action.(54)

Whether or not this proposal to restrict the role of the minister or cabinet is acceptable, the Municipal Board's findings and recommendations ought still to go to the municipal council. Even if full final responsibility were vested in the provincial cabinet rather than in municipal councils, the latter should have a chance to accept, reject, or modify its original action in response to the Board's recommendations before the matter is considered by the cabinet. This would be best achieved by directing the Board's findings to the council

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52 The original municipal decision and subsequently adopted implementing bylaws would be voided by the return of the matter to the council for reconsideration. To prevent pre-emptive development occurring before the matter can be reconsidered, the Planning Act should provide that such voiding not take effect until either the matter has been reconsidered by council or sixty days have elapsed, whichever is earlier.

53 Such cases correspond to the only ground on which citizens would be able to appeal under the Robarts proposals. In such cases the return of the matter to council would allow it to be dealt with properly there.

54 The procedure governing appeals to the cabinet should also be clarified. The proposals to this end in paragraph 10.43 of the Comay Report should be adopted for this purpose. In announcing a decision, the cabinet or the minister should be required to state the reasons behind it.

and permitting appeal to the cabinet from the municipality's response.

6.5 INTERVENTION TO IMPLEMENT PROVINCIAL OBJECTIVES

Intervention to protect citizen rights need only consist of providing for provincial veto of municipal actions that violate such rights. However, where intervention is to deal with conflicts between municipal and provincial planning policies, the provincial role is clearly not that of an arbiter. In such cases it is necessary to allow the province to modify municipal policies and to provide some forum in which such modifications may be reviewed. Here too, it is desirable to restrict provincial intervention to the minimum necessary.

Reducing provincial intervention

A central recommendation of both reports is that the present requirement for provincial approval of all official plans be replaced by a provision allowing provincial veto of all or part of a municipal planning action.(55) As the Comay Report argues (paragraph 4.5),

> It should not be necessary for the Province to approve municipal planning actions, but simply to make sure that these actions do not violate important provincial interests ... To review in order to approve means that the minister and his staff must make sure that everything is done the way they wish it to be done; to review in order to prevent what the province considers undesirable means that the minister and his staff need only concentrate on matters of direct provincial interest and can leave the rest alone.
>
> This limitation of the provincial role should allow routine local planning decisions to become effective in a shorter time than is now possible and the analysis of municipal plans by

55 The Robarts Report (p. 217) suggests that such a veto should procedurally be implemented through the province objecting within a set period of time (sixty days being suggested) of passage of a bylaw, with hearings of such objections being undertaken by the OMB, which would then make recommendations on the issue to the minister of housing for final determination of the issue.

provincial officials to be made more productive in attaining provincial objectives

Both reports propose that provincial vetoes of official plans be limited to cases where such plans are in conflict with provincial policies, with the reasons for the veto being clearly explained.(56) Provincial policies should be specified in detail and vetoes based on them, according to the Robarts Report (recommendation 11.4). However, this requirement would not permit the province to veto municipal actions which are inconsistent with emerging provincial policies not yet defined in formal statements. To deal with such situations, the provincial government must be able to extend the period within which it must file a statement of objection so that the required policy statement can be developed. The Comay Report's position is somewhat looser than that of the Robarts commission, in that a provincial veto would not have to be based on established provincial policy formally stated in advance. But the reasons for a provincial action must always be stated.(57) While the Robarts commission's call for clearly articulated provincial policies thus expresses the most desirable course, the Comay proposals are probably more workable and should be adopted.

In some cases, the desirable form of provincial intervention may be a modification of the municipal policy rather than a veto. The Comay proposals (paragraphs 4.7 and 4.11) would provide for either a provincial veto or provincial modification of municipal plans where required to incorporate provisions of provincial concern. These should be interpreted to imply an unrestricted provincial ability to modify municipal planning policy statements where required to reflect provincial interests.(58)

56 As noted in Section 7.3, "provincial policies" should be defined to include regional development policies adopted by regional provincial-municipal co-ordinating committees.

57 The proposals in paragraphs 4.8 and 4.10 of the Comay Report would bring a much-needed improvement in the communication of provincial policies and decisions to municipal planners.

58 This ability to modify planning policy statements should apply not only to cases where modifications are required to reflect provincial planning policies but also to cases where the province is required to resolve intermunicipal disputes on appeal by an objecting municipality. Intermunicipal disputes over planning matters are discussed in the next chapter.

The procedure to be followed in implementing a provincial modification or veto deserves comment. Where intervention is to cause additional provisions to be inserted in an official plan, the Comay Report proposes (paragraph 4.11) that such modifications should be reviewed by the Ontario Municipal Board before the provincial government decides on the matter. The Robarts Report proposes that the Board also hear the arguments for provincial intervention prior to a ministerial decision to veto a municipal planning statement. A hearing in which municipal officials may argue against provincial objectives would lead to better articulation of the nature of the conflict between provincial policies and municipal interest and present a forum to consider local interests. To this end, paragraph 4.7 of the Comay Report should be modified to provide that a provincial veto or modification be preceded by a Municipal Board hearing on the province's objection to the municipal action and the proposed provincial response.

In some cases, provincial objections to a municipal action may overlap with citizens' objections. Where the latter may become moot if the action is vetoed by the province, it would be advantageous to postpone the hearing of them until the provincial intervention is decided. Accordingly, the Planning Act should allow for a separation of citizens' objections from provincial objections and provide that the Municipal Board may elect to postpone hearing the former until after the provincial intervention to secure provincial interests has been decided.

Subsequent review of municipal policies

The foregoing discussion applies to provincial intervention at the time a planning policy statement is adopted by a municipality. As provincial policies evolve, it may become necessary for previously adopted municipal plans to be brought into conformity with new provincial policies. Curiously, no mechanism for the modification at provincial initiative of previously adopted official plans exists in the Planning

Act.(59) Moreover, the Comay Report's proposals for provincial veto or modification only apply to newly adopted municipal planning policies.

There is clearly a need for provincially initiated review of municipal planning policies and regulations that may no longer be compatible with provincial objectives. The Comay Report comments (paragraph 17.7) that this need may no longer exist if its proposals for the "delegalization" of official plans are adopted, since it would then be appropriate to repeal Section 32(4) of the Planning Act. However, this approach is unsatisfactory for reasons noted earlier.(60)

To allow the province to modify previously adopted municipal planning policy statements, the Planning Act should provide that the minister may at any time request a municipality to amend its adopted policy planning statements to bring them into conformity with a stated provincial objective. To ensure municipal compliance, the Act should provide that the reserve power and procedures proposed in paragraph 4.11 of the Comay Report should apply in this instance as well as in situations where a newly adopted municipal planning policy statement is reviewed by the province.

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59 The only mechanism that could be used for this purpose is the Draconian step of withdrawing all planning authority from the municipality. Moreover, although Section 32 of the Planning Act provides the minister with authority to issue zoning orders that prevail over municipal bylaws, this authority is limited by a requirement (Section 32(4)) that ministerial zoning orders must conform to an official plan that has been approved for the area to which a zoning order applies.

60 See Section 6.2. This comment applies to the rationale for this proposal and to the assumption that repealing Section 32(4) is sufficient. Section 32(4) would be redundant given the procedure suggested below, and should thus in any case be repealed.

Chapter 7

Planning in a fractionated region

The previous chapter dealt with the problems of planning in municipalities considered separately. In a dense urban region divided into a number of municipalities, the potential for spillover effects make necessary additional complexities in the institutional planning structure.

The proposals on these issues in the Comay and Robarts reports are discussed in this chapter. The first section considers intermunicipal conflicts in either a region containing a number of independent municipalities or a two-tier regional government where local and global spillover effects may need intermunicipal conflict resolution. The second section looks at planning in a two-tier regional municipality in which most regional planning issues arising from global spillover effects are dealt with at the upper-tier level. The problem of resolving conflicts between the upper-tier and the lower-tier municipalities is concerned primarily with the protection of minority interests which are spatially concentrated in a single local municipality.

It is of course a gross simplification to assume that regional problems are always handled at the upper level. Moreover, in the Toronto-centred urban agglomeration, a crucial problem is the co-ordination and consistency of the planning policies of neighbouring regional municipalities. In the Toronto-centred region, the provincial role must be broadened to become the equivalent of a third-tier government spanning the entire agglomeration and providing the planning necessary to deal with inter-regional spillover effects within the agglomeration. This problem, specific to Toronto, of planning for an economic region that accounts for more than 40% of the provincial population, is treated in the third section.

While the focus of this chapter is on structuring the planning process to facilitate intermunicipal conflict resolution, the significance of improvements to the process must be kept in perspective. More than in any other aspect of planning, the structure of the regional planning process has a relatively minor influence upon the nature of planning decisions. All planning decisions are political decisions, but this truisim needs to be doubly underlined when applied to regional planning. Consequently, the procedural reforms proposed in this chapter should improve the process but will not in themselves cause better regional planning to occur. The quality of regional planning will depend primarily on the quality and commitment of politicians and planners that participate in the process. The procedural reforms discussed in this chapter will facilitate good regional planning when and if participants demand it.

7.1 RESOLVING INTERMUNICIPAL CONFLICTS

This section deals with several issues: the resolution of objections by adjacent municipalities to municipal planning actions, the desirability of joint planning areas, and county planning.

Intermunicipal disputes

The Comay and Robarts reports pay little attention to the process by which intermunicipal disputes are resolved, implicitly assuming a continuation of the existing system in which any municipality affected by a planning action undertaken by another municipality can object and appeal to the province for the action to be disapproved or modified. However, it is important to ensure that the standing of affected municipalities in such cases is clearly defined and not limited to planning actions undertaken within the boundaries of the county or regional municipality containing the objecting municipality.

It is also important that the Planning Act provide requirements for notice to potentially-affected municipalities.(1)

Where an affected municipality objects to a planning action undertaken by another municipality, it should have the same rights to a hearing before the Ontario Municipal Board as an affected citizen. Moreover, where the Board finds in favour of the objection, the subsequent process should be as proposed earlier in Section 6.4: the matter should be returned to the originating council for reconsideration and the objector should be able to appeal to the provincial cabinet where the municipality has not taken sufficient regard for the Board's findings and recommendations. However, unlike in the case of citizen objections, the cabinet should have the power to modify as well as veto municipal planning policies in response to an appeal by another municipality.

Joint planning areas and intermunicipal co-ordination

In the present system, joint planning areas have been established encompassing more than one municipality. This has been done partly to obtain planning areas of sufficient size to afford necessary planning resources, and partly to ensure an integrated approach to planning in regions containing a number of municipalities.(2) But joint planning areas have not worked well in practice, primarily because the planning boards given responsibility for developing official plans for such areas have no links to most of the local municipalities within the area, even though the local municipalities have responsibility for adopting implementing bylaws. The Comay Report proposes (paragraph 7.9) that planning areas be eliminated from the Planning Act and planning powers be exercised only by municipal councils.(3) This proposal should be supported.

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1 Proposals to this end have been previously described in Section 4.4.

2 The nature of joint planning areas and their organization is summarized in paragraphs 7.2 - 8 of the Comay Report.

3 This recommendation is required to make the proposed municipal planning process described in chapter 6 functional. The concept of defined planning areas distinct from local municipalities is inconsistent with the proposed municipal planning process.

To achieve intermunicipal planning co-ordination, the Comay Report proposes that the Planning Act should allow the establishment of voluntary joint planning committees (paragraph 7.11) and that the planning role of county governments be strengthened (paragraph 7.13). Voluntary joint planning committees would be established temporarily when needed by adjacent municipalities; they would consist of representatives of the municipalities involved, and their role would be purely advisory. Since they would not be empowered to exercise any planning controls and would exist only to make recommendations to the local councils, it is difficult to see any reason why they should be mentioned in the Planning Act. Presumably, municipalities may at any time enter into voluntary joint planning on an informal basis.(4)

County planning

The Comay Report's proposals on county planning are based on the fact that many of the existing county governments are already engaged in some form of planning. Because county governments have a clearly defined structure of accountability and links to local municipalities, they provide a basis for two-tier planning in areas not formally reconstituted as regional municipalities.

The Comay committee makes several proposals with respect to county planning. The first is that county governments be given the same planning powers as upper-tier governments of regional municipalities. The second and third (paragraphs 7.14 and 7.15) would amend existing county planning powers to be consistent with the proposed powers of upper-tier regional councils.

In general, treating county governments as equivalent to regional governments would simplify the Planning Act and the associated institutional structure. But there are important

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4 It should be noted that voluntary joint planning committees should not be confused with the regional co-ordination committees discussed below.

differences between most counties and most regional municipalities. With the exception of four counties which contain large urban centers (Essex, Middlesex, Brant, and Wellington), counties are primarily rural. By contrast, the reconstituted regional municipalities are primarily city-centred (Muskoka is an exception) and subject to the problems of substantial urban growth. This difference is reflected in planning issues and in the resources available to support decentralized local planning. It ought to be reflected as well in the administration of rural zoning and land division. Accordingly, the Comay proposal (paragraphs 5.22 and 7.15) to empower county councils to delegate to local municipalities approval authority for subdivisions and land severances should be conditioned on the adoption of a county planning policy statement defining the criteria for delegation, on the delegation not applying in rural areas, and on provincial approval. The latter would ensure that provincial policies regarding rural land division can be implemented effectively.

Subject to this qualification, the Comay proposals for county planning should be supported. Their primary effect is to clarify the role of upper-tier planning; in purely rural areas county-wide planning would probably be relatively limited. The proposals in chapter 6 to allow the adoption of municipal planning statements without a comprehensive plan would be of particular relevance in such circumstances.

7.2 TWO-TIER PLANNING

It is extremely difficult to deal effectively with regional planning issues (i.e. with global spillovers) without some kind of regional governmental structure through which these issues can be directly addressed. However, the introduction of regional government substantially increases the importance of protecting location-specific minority interests, and it is therefore necessary to examine the role of local municipalities in a two-tier regional governmental structure to see how they

may be utilized to provide such protections. How well this may be accomplished is of course something that depends on the dynamics of the political interplay that occurs within the institutional structure. This political interaction is complex, and includes at a practical level a significant provincial involvement.

The Comay and Robarts reports take note of the problems of protecting minority interests in regional planning decision. They adopt as a basic premise the notion that the control of land use and related planning actions are primarily local concerns. Regional planning should in their view be limited to defining a general structure to which local planning actions are reconciled. Their proposals would improve and clarify the relationship between regional and local planning. But neither explores the possibility of enhancing the role of local municipalities in the approval of regional planning policy statements.

In what follows, the adjective "regional" is used to denote functions assigned to the upper level in a two-tier regional government. Lower-tier units are described as local or area municipalities. In some cases (e.g. Sudbury and Ottawa-Carleton), the boundaries of an upper-tier municipality may be presumed to accord with the natural boundaries of a geographic region. The additional problems that arise when they do not are discussed in the next section.

The introduction of two-tier regional governments has been done on a case-by-case basis over the past decade. While there are reasons for some variation in upper-tier planning responsibilities (primarily reflecting variations in the strength of lower-tier municipalities), the scope and status of regional planning functions should be clarified and made more uniform.

The scope of regional planning

Both reports advocate that detailed land use planning be the responsibility of the local municipalities, primarily on the ground that "the level of government most familiar with the

local area and the needs and desires of its people should have the responsibility for regulating land-use within it."(5) Regional planning is limited to area-wide planning issues (including government functions assigned to the region by statute).

The Comay Report proposes (paragraphs 8.15 and 8.16) that the general scope of regional planning interests be defined in the Planning Act, and that the quality of local planning (and local planning procedures) should not in themselves be matters of regional concern (paragraph 8.19). These proposals would serve to clarify the role and scope of regional planning functions, and should be adopted.(6) The report proposes (paragraph 8.16) that the scope of upper-tier planning interests should be defined as follows: "The Planning Act should define the basic regional planning interest as being the region's development pattern and structure. But it should establish that the regional planning concern with the development pattern or structure arises from the [upper-tier] council's basic responsibility for the regional economy and natural resource base, and from its statutory responsibilities". The purpose of the qualification is to ensure that the regional planning focus on over-all development structure is limited to region-wide interests. The qualification is appropriate, particularly since the primary purpose of upper-tier planning is to determine the basis for upper-tier intervention in local planning actions and such intervention should be the minimum necessary to ensure adherence to regional objectives. Regional planning would presumably thus deal with such ques-

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5 *Report of the Royal Commission on Metropolitan Toronto,* Vol. 2, 216. The Robarts Report also notes that most of the local services which must be co-ordinated with planning actions are provided by the lower-tier governments.

6 The Comay Report proposes (paragraphs 8.18 and 8.32) that the Planning Act should define the general scope of regional planning for upper-tier municipalities (including counties), and that individual regional government Acts should provide for specific additional planning responsibilities of upper-tier governments where appropriate in particular regions. However, existing variances in the individual regional municipality Acts ought to be reviewed.

tions as the interaction between the location (and density) of employment or housing and the location (and type) of regional transportation facilities or other regional services. The location and phasing of major regional transportation investments, obviously a crucial element of regional and local planning, should be a required component of a regional plan.(7)

Relationship of regional to local planning

The restricted scope of regional planning deemed appropriate by both reports is reflected in their proposals for implementation of regional planning policies. It is assumed that such policies should be implemented as constraints on local planning actions rather than through direct upper-tier intervention in local development control. As a result, the primary means by which regional interests would be protected is through requiring that local planning policy statements have regard for adopted regional planning policies.(8)

Both reports recommend that regional intervention in local planning decisions be limited to ensuring that such decisions are not in conflict with regional planning policies as expressed in planning policy statements adopted by the regional municipality. Further, they recommend that such regional intervention be made in the form of objections to a local planning action which are then heard by the Ontario Municipal Board and decided by the provincial government.(9) The reports

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7 Given the potential adoption of issue-specific municipal planning statements rather than official plans in slow-growth regions, this requirement should be implemented by requiring that upper-tier municipalities adopt a regional planning policy statement describing the location and phasing of any major new regional transportation facilities (including arterial roads) prior to adopting any regional planning policies permitting new land uses.

8 Where local planning policy statements are sufficiently precise, regional intervention in local planning actions of an implementing nature may be limited to ensuring that local actions do in fact conform to the relevant local planning policy statements.

9 The Robarts proposals are contained in recommendations 11.3, 11.4, and 11.6. The Comay proposals are contained in paragraphs 8.25 to 8.29.

thus provide for provincial resolution of conflicts between regional and local municipalities rather than allowing unrestricted regional intervention in local planning.

Nevertheless, the reports differ somewhat in their perceptions of the role of regional planning. The Robarts Report (recommendation 11.12) suggests a continuation of the existing requirement for local plans and bylaws to be brought into conformity with regional planning policy statements upon the latter becoming official.(10) This is a fairly strict "top-down" approach in which regional planning policies take precedence over local plans and bylaws. (Local municipalities would of course be able to object to regional planning policy statements, with such objections being heard by the Municipal Board and subsequently decided by the minister.)

The Comay Report envisages a looser relationship between regional plans and local bylaws. It proposes (paragraph 8.31) that local municipalities simply be required to have regard for relevant regional planning policy statements. It further assumes (implicitly) that the proposal described above for regional objection to new local planning actions is sufficient to ensure that local planning actions comply with regional planning policies. The Comay Report consequently does not suggest any means by which a regional government may require that all previously adopted local bylaws be brought into conformity with regional planning policy statements. However, it does propose (paragraph 8.59) that regional municipalities be empowered to request the amendment of local bylaws and the inclusion in local planning policy statements of specific provisions of regional interest, with provincial resolution of the matter in the event of local refusal.

The major difference between the Comay and Robarts proposals is in the extent to which local plans and bylaws must

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10 The Robarts Report also proposes (recommendation 11.13) that, to implement this requirement, the regional municipality be empowered to appeal to the OMB for an order implementing the necessary amendments. The Report notes (page 224) that the regional council would be expected to identify local bylaws that require amendment and set a reasonable deadline for such amendment; the Board, on hearing the appeal proposed in recommendation 11.13, would have the option of extending the deadline set by the regional council.

conform to regional planning policies. The Robarts Report assumes that any conflict between local and regional municipalities will normally be dealt with at the time a regional planning policy statement is adopted, so that the subsequent implementation of the regional policy should be expedited.(11) By contrast, the Comay Report assumes that the implications of a regional planning policy statement should not be regarded as necessarily clear, so that any attempt to bring a non-conforming local policy or bylaw into conformity with regional planning policy statements should be regarded as a separable conflict to be resolved on its own merits.

Provided that sufficient protection of minority interests is built into the process of provincial review, the Robarts proposals would be preferable to the Comay ones, since they would provide for resolving a conflict once and for all at the time the issue is dealt with. However, protecting minority interests is a strong proviso. If additional protections of minority interests (such as those proposed in Section 4.4) are not built into the institutional structure of regional planning, the more extended opportunities for conflict resolution envisaged in the Comay proposals would be prefereable to the quicker process proposed by Robarts.

The legal status of upper-tier plans

This question is of considerably less significance than the legal status of area municipality planning policy statements. The need for certainty and for efficient information-dissemination which is met by a local official plan to which regulatory decisions must conform is a need felt by individual citizens. If this need is satisfied at the local

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11 The Robarts Report's "expectation" (page 224) that regional councils would identify local bylaws that would require amendment is an important element in reviewing objections to a regional planning policy statement. The "expectation" should be strengthened by requiring that regional municipalities notify local municipalities of all amendments to local bylaws needed to bring them into conformity with a new regional planning policy statement at the time the local municipalities are formally notified of the adoption of the policy statement.

level, there seems little reason (other than attempting to make inter-tier conflict resolution easier) for requiring strict conformity of local planning policy statements to adopted regional policies. It would of course be necessary at least to require local policies to have regard for adopted regional policies.

Because the upper-tier municipality may be expected to have sufficient staff resources to monitor and review local planning actions and because it would in any case have to request the province to direct a lower-level municipality to alter local planning policy statements that are in conflict with adopted regional planning policies, the precise legal status of upper-tier plans will not affect the regional council's ability to implement its planning objectives. There would seem little point in having a legal requirement for strict conformity of local plans to regional policies (other than as a means of expediting provincial adjudication of planning disputes between local and regional municipalities) when the interpretation of conformity is itself regarded as a matter for political adjudication by the province.

Regional planning policy statements will have their most important effect on the location and phasing of major regional investments in transportation and land servicing facilities. Such investments are of critical importance both for private land use decisions and for detailed planning by local municipalities. For this reason there must be at the regional level a prior planning justification for major regional investments in transportation and servicing facilities; and this prior planning should be formalized in regional planning policy statements that define the general location of such facilities. The Planning Act should require that major new regional facilities and their location be specified in and conform to adopted regional planning policy statements, but that the phasing and relative priority of such investments need only have regard for such policies. The requirement for strict conformity should apply to the general as opposed to precise location of facilities.

This proposal differs from what was stated in chapter 6 regarding local public works: namely, that they should be required merely to have regard for adopted planning policy statements. This reflects the greater strategic importance of regional public works. In addition to providing greater certainty about the general location of new regional facilities, the proposal would ensure that regional investment decisions of particular significance are subject to the same procedural safeguards as would be applied to the adoption of regional planning policies. These safeguards would then ensure that the implications for local planning of major new regional facilities are weighed against regional benefits in any provincial adjudication of planning disputes between upper and lower levels over proposed regional facilities.

The approval process for upper-tier plans

Both reports provide for provincial resolution of local-regional planning disputes, as happens currently, with lower-tier municipalities able to object to a regional plan and to have their objections heard by the OMB. (The current hearings on objections by the City of Ottawa to provisions of the Ottawa-Carleton regional plan are an example.) At the same time they recommend that the Board's findings and recommendations be submitted to the minister for decision. If the normal appeal process were modified so that Board findings were submitted to the originating council for decision, with objectors having a right of appeal to the provincial cabinet (as proposed in Section 4.3), it would be applicable to regional planning policy statements. In that case, Board findings on all objections to a regional planning policy statement would be directed to the regional council, with all objectors (including local councils) having a right of appeal to the provincial cabinet against those findings or against a regional council's rejection of them.

While neither report proposes any further means for dealing with local-regional disputes, the additional approval

requirements proposed in chapter 4 should be considered, because they would encourage more frequent resolution of local-regional disputes by direct negotiation. The most important aspect of such disputes is that they cannot be satisfactorily settled except by compromise. A negotiated settlement will normally be preferable to a solution imposed through provincial intervention.

Upper-tier regulation of development

Consistent with minimizing unnecessary regional intervention in local planning decisions, both reports propose eliminating the current regional zoning authority.(12) Since their recommendations would enable regional councils to object to local zoning actions that conflict with regional planning policy statements, an authority is unnecessary.

While development control (including development review under Section 35a of the Planning Act) should be viewed as a matter for local determination, the legal implementation of requirements necessary to satisfy regional planning policy statements should not be dependent on local municipalities for enforcement. The Comay Report proposes (paragraph 8.43) that regional councils be a party to all forms of development agreement. Although not entailing a material change in present procedures, this would be a technical improvement and should be supported. Moreover, regional councils should be able to delegate responsibility for entering into such agreements to regional officials.

Provided that both regional and local councils are parties to subdivision agreements (and that subdivision approvals may be objected to by regional councils where inconsistent with regional planning policy statements), there would seem little reason not to assign responsibility for subdivision approvals in urban areas to lower-tier municipalities. Such an

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12 The Comay Report proposes (paragraph 8.40) that an exception be made in the case of existing provisions for upper-tier zoning authority in Oxford County and in the Sudbury and Haldimand-Norfolk regional municipalities. However, these exceptions should be viewed as temporary and reviewed by the province at periodic intervals.

assignment would be consistent with the assignment of other development control decisions to local municipalities.

The Robarts Report implicitly (in recommendation 11.2) proposes that subdivision approvals be a lower-tier responsibility within Metropolitan Toronto. The Comay Report suggests (paragraphs 5.18-20 and 8.36) that land severance consents and subdivision approvals be differentiated between rural or urban areas, with rural subdivisions being dealt with by upper-tier councils and urban subdivisions by local municipalities. The Comay Report goes on to propose that subdivision and severance approvals be assigned to the upper-tier council, but that the regional council should have the right to delegate approval authority to local councils.

It would be preferable for the assignment of land division approval authority to be consistent within the province. Moreover, the Comay Report's reasons for differentiating in the approval process between urban and rural areas are persuasive. The Planning Act should therefore assign approval authority to upper-tier councils (including counties) for land division in rural areas and to local municipalities for urban land divisions. However, it should also provide that urban land division approval authority may be assumed by an upper-tier municipality on the request of a lower-tier municipality.

The major conclusion that should be drawn with respect to the upper-tier role in development control is that upper-tier municipalities should be notified of local planning actions prior to approval by lower-tier councils and should be empowered to be parties to any subdivision or development agreements along with local muncipalities, but that authority for zoning, land division, and other development control should generally be assigned to lower-tier governments. Regional interests may be fully secured through powers of objection and appeal to the province.

7.3 REGIONAL PLANNING

A major unresolved problem in provincial planning concerns regional planning when more than one regional government is

involved. This problem will be dealt with first in general terms and second in terms of specific recommendations for regional planning in the Toronto metropolitan region and the surrounding areas.

Inter-regional co-ordination

Many so-called "regional" governments, though upper-tier, do not encompass a region but share it with others. While in Ontario this problem is particularly important around Toronto, it is potentially significant elsewhere too. The provincial decision to base two-tier governments on county boundaries has resulted in arbitrary divisions of regions. Areas with significant future potential for inconsistent planning include the Hamilton-Nanticoke area, including Brant county and the regional municipalities of Hamilton-Wentworth, Niagara, and Haldimand-Norfolk; the Guelph-Kitchener area, including Wellington county and the regional municipality of Waterloo; and the Oshawa-Peterborough-Cobourg area, including the regional municipality of Durham and parts of Peterborough, Victoria, and Northumberland counties. In all three areas the solution of region-wide planning problems has been hindered by the fragmentation of regional planning authority among several county and upper-tier governments.

The best way to deal with fragmented regional authority would be to reconstitute regional governments with boundaries closer to true regional ones and to adopt provincial planning policies that maintain existing gaps between adjacent regions. Such an approach would imply enlarging the municipality of Metropolitan Toronto to include the southern portion of York Region and the southern part of Peel and Halton (including Brampton), and establishing three new regional governments in the three regions referred to above. The planning policies of these four regions should then be required to direct urbanization away from the boundaries of the regions in order to maintain the existing interregional separation. Presumably, each region should also be encouraged to develop in a manner

that promotes a relatively balanced growth of employment and housing. Since this optimal approach is probably not politically feasible at the moment, it is necessary to find a "second best" approach to planning for these four geographic regions in what may be called the Toronto-centred metaregion.(13)

Provincial concern about overconcentration of employment in the Toronto-centred area makes it important to develop these regions as alternative growth centres. This must be facilitated by effective regional planning, supported by provincial investments in transportation facilities and other key infrastructural elements that affect business location. At the moment, too much provincial infrastructure investment follows market forces to Toronto, even though policy rhetoric is decentralist.(14) Important economies of scale in urbanization give significant advantages to employers located within the commuting area of a large and varied labor force, and investments in intra-regional transportation facilities can increase the effective commuting area. By implementing two-tier governmental structures which are too small to be effective *regional* governments, the province has implicitly discouraged a co-ordinated approach to regional planning.

The Comay Report, recognizing the need for planning at a regional level, proposes (paragraph 7.19) that formal planning institutions be created to co-ordinate the upper-tier planning within a fragmented region. It proposes that permanent

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13 The word "metaregion" will be used to denote the entire Toronto-centred area, encompassing the Toronto metropolitan region (Metro Toronto plus the southern parts of Halton, Peel, and York counties), the Hamilton-Nanticoke region, the Guelph-Kitchener region, and the Oshawa-Peterborough-Cobourg region, as well as the Barrie region and the northern parts of Halton, Peel, and York.

14 An example is provided by the provincial commitment to large-scale community development in the Pickering area, which would be better directed to the east of Oshawa in order to encourage employers to locate in the Oshawa-Port Hope area. The earlier decision to locate a new airport at Pickering rather than east of Oshawa is a further example of the failure to use large transportation investments as employment-creative forces for regional development (as opposed to simply locating them where *current* demand is greatest).

regional co-ordinating committees be established for this purpose, with representatives from upper-tier councils and from provincial ministries, and that these committees report to upper-tier councils on both long-term region-wide planning questions and current land use issues.(15) It further proposes (paragraph 7.20) that the organization and operation of such committees be developed through study by the provincial government and by the relevant upper-tier governments in each region. The Robarts Report recommends a similar structure for the Toronto-centred area (recommendations 8.1-3). While these proposals should be supported, they will have little impact unless the provincial government takes a strong leadership role in regional planning. The creation of regional co-ordinating committees should be accompanied by a provincial commitment to the development and support of regional development plans; these should be co-ordinated with plans for the phasing of provincial infrastructure investments in each region.

Regional development policies should be reflected in regional planning policy statements adopted by upper-tier governments within the region. While much planning co-ordination may occur on a voluntary basis, it is a provincial responsibility to ensure (through provincial veto or modification of upper-tier planning statements) that provincial regional development policies are reflected in upper-tier plans. The regional co-ordinating committees should play a role in the formulation of provincial responses to planning actions of upper-tier municipalities, and the Planning Act should therefore empower regional co-ordinating committees to advise the province on the consistency of upper-tier plans with adopted and emerging regional development policies.

Because of the importance of such advice, the Act should be explicit as to its role. "Regional development policies" should be defined as general regional planning policies adopted jointly by the province and by two-tier municipal governments within the region. The Planning Act should require that

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15 It also proposes that local municipalities be temporarily represented on such committees as needed.

regional planning policy statements adopted by upper-tier muncipalities within the region have regard for regional development policies, and this requirement should be administered by the province using the provincial powers of veto and modification to ensure compliance with provincial policies.

With respect to the operation of regional co-ordinating committees and the adoption of regional development policies, several key points should be noted. (1) The regional committees should formally report to the provincial government as well as to upper-tier councils within the region. (2) Central local municipalities to which regions are oriented should be represented on such committees as well as upper-tier municipalities. (3) Municipal representatives should be chosen by municipal councils. (4) To function effectively, regional committees will require their own staff and hence budgetary allocations from the province. (5) Copies of all reports on proposed regional development policies considered by regional co-ordinating committees should be provided for information to all members of municipal councils represented on such committees. (6) Regional development policies should be adopted by the province on the advice of regional co-ordinating committees, subject to the approval of two-thirds of the councils of municipalities represented on the co-ordinating committee.

These recommendations go beyond the Comay proposals to establish a formal structure in which municipal governments within each region may take part in formulating regional development policies but in which the crucial role of the province is explicitly recognized. Regional development policies must be viewed as primarily a provincial responsibility, and the regional co-ordinating committees will not be effective except as a means by which provincial policy may be developed and articulated. However, there must also be a municipal role in the development of provincial policies for the region, and the proposed structure would provide for this role.

In proposing a regional co-ordinating committee for the Toronto region, the Robarts Commission also recommends (p. 132)

that a provincial minister be designated to co-ordinate provincial activities in the Toronto area; a minister with this responsibility might be designated for each planning area in which a regional co-ordinating committee is established. Such a ministerial position might be either separated from other responsibilities (i.e. held by a minister without portfolio) or combined with them. It would be a significant practical and symbolic commitment to the importance of regional development planning and should be adopted.(16)

Regional planning is difficult; the effects of regional planning are particularly subtle and complex. The major practical effects of devoting more resources to this problem may come more through informal co-ordination and a heightened awareness of issues than through formal decisions on regional development plans. Enhancing the importance of joint provincial-municipal planning through the work of the proposed regional co-ordinating committees would promote this.

Planning in the Toronto metropolitan region

The lack of planning is particularly serious in the Toronto metropolitan region, where boundaries between the "regional" municipalities within the metropolitan region are as arbitrary as boundaries between local municipalities.(17) The Robarts Commission, clearly concerned with this problem, proposed (recommendations 8.1 and 11.16) that a Toronto Region Co-ordinating Agency be established to bring together the planning policies of provincial and municipal governments within the Toronto region. This agency would be one of the regional co-ordinating committees just discussed. Several specific responsibilities for it were recommended by the

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16 Such designation would also provide for clear ministerial responsibility for the reconciliation of interdepartmental differences within the provincial government.

17 As noted above, the Toronto metropolitan region includes Metro Toronto plus the southern portions of the regional municipalities of Halton, Peel, and York.

Robarts Commission. These include: the development of housing targets (recommendation 12.1), the review of plans and budgets of the Toronto Area Transit Operating Agency (recommendation 13.9), the development of regional programs for recreation land acquisition (recommendations 14.3 and 20.2), and the review of budgets of conservation authorities and other operating agencies of a regional nature (recommendation 8.3). Its review of operating agencies would ensure a co-ordinated approach to the implementation of regional policies administered by these provincially-established special-purpose bodies. All of the specific responsibilities proposed would enhance the Agency's ability to be an effective forum for regional planning and should be supported.

Participation in the regional co-ordinating committee proposed by the Robarts Commission (recommendation 8.2) should be reviewed. The Toronto region was defined to include the regional municipalities of Hamilton-Wentworth and Durham. As noted above, it would be better to assign Hamilton-Wentworth and Durham to two distinct regions, thus recognizing existing growth in regions adjoining Hamilton-Wentworth on the west and Durham on the east and reinforcing the emergence of separate regional economies focused on Hamilton and Oshawa.(18)

A second difficulty with the proposed co-ordinating committee concerns the role of key central-area local municipalities. The local municipalities of Toronto, Hamilton, and Oshawa should be directly represented on regional co-ordinating committees, with representatives chosen by the councils of each city. If the Toronto Area Co-ordinating Agency is established spanning parts of all three regions (as proposed by the Robarts Commission), then all three regional centres should be represented directly on the Agency. If three separate regional co-ordinating agencies are established (i.e. if the Toronto

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18 This separateness is now reflected in the draft Durham regional plan and will be reflected in the development of Nanticoke as a major industrial centre.

agency excludes the Hamilton-Wentworth and Durham areas), then Toronto should be the only local municipality directly represented on the Toronto agency.

Provincial planning for the Toronto metaregion

A considerable provincial planning effort for this area has taken place over the past decade, reflected in the "Design for Development" plan and subsequent modifications and implementing strategies.(19) While this provincial planning effort has been incomplete in both planning and execution, it has, in spite of numerous inevitable compromises, presented a context for local and upper-tier municipal planning within the region. In particular, it has influenced perceptions of the appropriate role of land use regulation in obtaining increases in employment and housing with smaller over-all social costs, and hence has implicitly rationalized, while contributing to, rising land prices and a more intensive use of land by market participants.(20) Given the global externalities of a congested metropolitan area located in the midst of scarce farmland with limited public recreational land, unrestricted market determination of land uses in the Toronto-centred region would have resulted in a less optimal pattern of land uses.

The major social costs associated with the Toronto-centred metaregion planning effort were primarily of a transitory nature, resulting from the costs of adjusting private decisions

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19 Cf. Government of Ontario, *Design for Development*, April 1966; *Design for Development: The Toronto-Centred Region*, April 1970; *Toronto-Centred Region Program Statement*, March 1976; and numerous specific statements on the Niagara escarpment plan, the proposed Parkway belt, agricultural land preservation, and regional planning in Durham and Northumberland. Provincial land use policies in the Toronto-centred region are reviewed in detail in a forthcoming study by Mark Frankena and David Scheffman for the Ontario Economic Council.

20 It should be noted that the effect of provincial policies has been primarily on the utilization of land (and hence on land intensity in the production of housing and work space) rather than on the price of housing. Some analysts have incorrectly assumed that land use restrictions necessarily imply a reduction in the supply of housing and work space, rather than a change in factor intensities.

to the restrictions introduced by provincial planning efforts.(21) Since most of these costs have already been incurred (and are hence "sunk costs" from the viewpoint of current analysis), the further implementation of the Toronto-centred region plan should result in progressively higher "benefit/cost ratios" for successive implementing decisions, provided that such decisions avoid sudden changes in the constraints on private development activity. This is particularly so with the restriction of urban development outside the areas immediately adjacent to currently developed areas. The detailed land use plan evisaged by the 1970 "Design for Development" scheme is less significant than its qualitative implications because the details of any general plan are inevitably (and appropriately) subject to compromise.

The challenge in regional planning is obviously to find an effective way to implement as much as possible of the general objectives of provincial planning through a joint approach by provincial and municipal governments. The two-tier municipal governments recently established within the Toronto-centred metaregion can be efficiently utilized for this purpose. Permanent joint provincial-municipal institutions to deal with regional planning issues (the regional co-ordinating committees proposed by the Comay committee and the Robarts commission) would enable a more effective joint planning effort. Such an institutional structure for regional planning, a logical successor to the purely provincial planning efforts of the early 1970s, should be implemented. At a minimum, regional

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21 Cf. e.g. Frankena and Scheffman, Ontario Economic Council, forthcoming. The adjustment by producers to the introduction of the new controls is an example of the importance of differentiating between temporary and permanent social costs associated with new controls. As noted in another study (Markusen and Scheffman, *Speculation and Monopoly in Urban Development: analytical foundations with evidence for Toronto*, Ontario Economic Council, 1977, chapter 6), it is normal for there to be long lags between land assembly and development, so that private producers may adjust to approval delays simply by submitting development applications earlier. Given this, significant additional carrying costs are incurred only in the transition period during which longer approval times were unexpected. Moreover, it is likely that longer approval delays are themselves partly a transient phenomena resulting from administrative uncertainty over new development controls.

co-ordinating committees should provide a forum through which regional demands for provincial co-ordination can be articulated. Whether more than this is accomplished will depend on provincial leadership. Whether even this occurs will depend on the quality of municipal politicians and staff.

The Ontario Planning and Development Act, 1973

This Act furnishes a formal procedure for the creation of regional development plans. It allows "development planning areas" to be established by ministerial order and establishes formal procedures for the preparation and adoption of plans for such areas.(22) Unlike the Planning Act, for which the Minister of Housing is responsible, the provincial treasurer is responsible for the Planning and Development Act. Once a development planning area has been established and a plan adopted, all official plans and municipal bylaws within the area must be amended to conform with it. Two development planning areas have been established to which the Planning and Development Act is deemed to apply.(23)

The provisions of the Ontario Planning and Development Act serve two purposes. First, by formally requiring municipal planning policies to be amended to conform to newly articulated provincial planning policies, the Act provides a mechanism not available in the present Planning Act for implementing provincial policy.(24) Since this mechanism can be obtained more

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22 These procedures provide for the establishment of advisory committees to assist in the preparation and implementation of such plans, the participation of affected municipalities, and the hearing of affected parties by appointed hearing officers. After submission of reports to the minister by hearing officers, the minister submits a plan to the provincial cabinet for its adoption, at which point the plan comes into effect.

23 These are the Niagara escarpment area and the parkway belt surrounding Metropolitan Toronto. These two planning initiatives were established by special legislation.

24 As noted in Section 6.5, there is no formal mechanism in the Planning Act for provincial intervention to modify municipal planning statements in existing official plans.

easily by amending the Planning Act, the Planning and Development Act is a clumsy device for modifying municipal plans. Second, the Ontario Planning and Development Act potentially offers a means of implementing some forms of regional development plans. However, the very strong degree of provincial intervention contemplated by that legislation is reasonable only for highly specific purposes such as the major environmental protection initiatives in the Parkway Belt and Niagara Escarpment plans. For such restricted purposes, the Ontario Planning and Development Act is effective.(25) But it will work only in situations (such as the Parkway Belt plan) where it is necessary to develop a detailed and specific provincial planning policy statement to which local and regional planning policy statements must conform.(26)

For general regional development plans, the Ontario Planning and Development Act should not be utilized. Such plans are meant to serve as general planning guidelines for upper-tier councils adopting regional planning policy statements (and for the province in reviewing such statements). Upper-tier municipalities should accordingly be required to

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25 It may be noted that in such instances the detailed implementation of such provincial initiatives necessarily implies a requirement for adjudication of the impact of the initiative on property rights. The procedures specified by the Planning and Development Act provide an effective means of meeting this requirement. Moreover, these procedures have the advantage of being entirely separate from the general regional planning process and thereby more clearly defined as a provincial responsibility. Were such procedures integrated into the normal regional planning process, provincial accountability for such initiatives would be diluted.

26 It is only in such cases that the notice and hearing provisions of the Ontario Planning and Development Act are appropriate. However, to state the corollary of this position, it is precisely in such situations that the Ontario Planning and Development Act is of value. It would be unfortunate if this Act were not to be utilized in dealing with the Parkway Belt East. The Comay Report's recommendation (paragraph 17.8) to deal with the Parkway Belt East only through the medium of the Durham Regional Plan should not be adopted unless it is clear that approval of the Durham plan will not be delayed by extended proceedings concerned with the precise delineation of parkway zone boundaries.

have regard for regional development plans, and the interpretation of the implications of regional development plans should be an explicit provincial responsibility. The provisions for provincial modification of municipal planning policy statements described in Section 6.5 are adequate to implement this responsibility. Moreover, the formal hearing procedures prescribed by the Planning and Development Act are neither necessary nor appropriate for the development of general planning guidelines.

To summarize, the Planning and Development Act provides a useful instrument for the implementation of specific provincial planning initiatives of a regional nature. However, it does not provide an appropriate instrument either for the achievement of provincial objectives in the review of municipal planning actions or for the adoption of general regional development plans to provide contextual guidelines for upper-tier municipal planning. Such purposes are better served by the process of provincial review described in Section 6.5 and by the establishment of regional co-ordinating committees. The Planning and Development Act should consequently be maintained in place for the sole purpose of dealing with the special provincial planning initiatives such as the Parkway Belt plan that will occasionally be necessary.

Chapter 8

The implementation of planning policies

This chapter turns to the methods by which planning policies are implemented, discussing both the implementing regulations and the process by which the regulations are adopted.

Increasing the efficiency with which implementing regulations are made is central to minimizing the social costs of regulation. The Comay Report makes a number of very useful proposals for changes in regulations and in the regulatory process. Yet these suggestions would still not altogether eliminate the weaknesses and inconsistencies in the current regulatory system. The proposed revision of the Planning Act presents an opportunity to increase regulatory efficiency by ridding the system of these weaknesses that it would be a pity to let pass by. Proposals to deal with the problems left unsolved by the Comay Report are consequently made at appropriate points in this chapter.

The efficiency of the regulatory process depends in part on the relationship between the implementing bylaws and the planning policy statements, which in turn depends on the role and legal status of the latter. Several weaknesses in the Comay recommendations for implementing procedures are a direct result of the loose relationship between implementing regulations and planning policy statements that results from the committee's own proposal to diminish the legal status of adopted planning policy statements presently provided by Section 19(1) of the Act. While this proposal has been criticized in preceding chapters as likely to raise the social costs of planning, the additional technical problems it engenders in defining the use of implementing regulations increase the importance of improving on it.

Regulations governing development control on predefined lots are discussed in the first two sections of this chapter. Regulations concerning the creation of new lots through division of a larger lot are discussed in the third section. Certain specific aspects of land use regulation are separately dealt with in the fourth section. The fifth section examines whether municipal choices of development standards should be constrained by the province. The final section discusses the Comay proposals for development control in Northern Ontario.

It is important to note that practice may vary considerably from what is envisaged in legislation and regulations and will not necessarily respond to a legislative change in the manner expected. One of the most important regulatory tools in practice is the ability of municipal officials to delay consideration of a development, a feature inherent in any regulatory process and not subject to provincial control.(1) The power to delay has often been used to impose regulatory controls that go beyond those authorized by statute. In addition, municipal use of regulatory instruments provided by the Act has frequently been distorted in order to allow the exercise of municipal discretion. Such "misuse" of planning powers is inevitable and even appropriate, in that it is the responsibility of municipal officials to achieve municipal objectives in the most effective manner possible given existing regulatory tools. Indirect use of the system in this way, however, is socially inefficient.

A primary objective in reviewing regulatory techniques should therefore be to find more efficient ways of achieving all municipal regulatory objectives. Attempts to limit through legislation the objectives of municipal regulation will often be largely ineffective and may simply lead to inefficiency.

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1 Gross abuses of the ability of municipal officials to delay consideration of an application for a planning action may of course be checked by allowing appeals to the province against undue delay. Such appeals are currently provided for by Sections 17(3) and 35(22) of the Planning Act; proposed modifications of this appeal process are discussed below. However, since any appeal process must have a hearing, and thus introduce further delays, provision for appeals from municipal delays will not eliminate opportunities for municipal procrastination.

Legislation must define limits to the regulatory process and provide for appeals against gross abuse of municipal powers. The challenge in doing so is to specify such limits in a manner that allows for the range of municipal regulatory objectives and provides efficient means of implementing them. Evaluations of proposals for changes in the regulatory process must be focused on how a changed regulatory system will actually be used by municipalities.

8.1 DEVELOPMENT CONTROL INSTRUMENTS

Development control instruments may take many forms. In Ontario the primary regulatory tool for this purpose has been the zoning bylaw, which regulates such matters as uses, building density, minimum setbacks from property lines, and building height.(2) Although zoning bylaws can be extended to detailed control of building envelopes, the primary control has traditionally been through density limits that define the maximum permissible ratio of gross floor area to lot size. Where the purpose of zoning bylaws is essentially to make new developments consistent in form and use with existing buildings in an area, the building envelope constraints that can be incorporated in the zoning bylaw can provide substantial certainty about the form of development.(3) Zoning bylaws thus effectively implement planning policies where such policies call for the maintenance of the current level and form of development and where desired building envelopes are known. In this respect zoning bylaws are efficient in serving the purpose for which they were originally designed, namely ensuring compatible redevelopment in stable areas.

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2 The matters which may be regulated are listed in Section 35(1) of the Act.

3 Such building envelope controls may include not only setback provisions and over-all height limits but also additional height limits and/or angular planes at particular setbacks from street frontage building lines or from lot limits.

The major problem with the use of zoning bylaws for development control arises when an area is expected to change and new developments will be of a different form, scale, or use. In such circumstances it may be difficult to determine in advance the appropriate form and siting of new developments and to prescribe detailed density and built-form restrictions that implement the intentions of planning policy statements. In the current system this difficulty has been dealt with in two ways. One is to enact zoning bylaws that only permit uses or building densities which are less profitable than those viewed as potentially appropriate in the long term, thus requiring the developer to apply to the municipality for a rezoning in order to attain preferred uses or densities. Approval of the rezoning application may be made conditional on an agreement with the developer on the details of the proposed development. A second method is to zone as potentially appropriate but to require approval of details of siting, built form, vehicular access, and landscaping before issuing a building permit for a development which conforms to the zoning bylaw. This second process--which will be referred to as "development review"--was provided for by the enactment of Section 35a of the Planning Act in 1973 in order to lessen reliance on rezoning as a way of getting detailed municipal review of development design, and thus to provide more certainty about the permissible density of development.(4)

An alternative way of specifying desirable criteria is simply to consider all development applications *de novo*, with no development permissible as a matter of legal right. Such a system (termed a "development permit" system) gives a municipal council substantial discretion in an application, even though such discretion might be limited by adopted planning policy statements to which municipal decisions must conform. The

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4 The widespread use of both rezoning and development review to achieve detailed municipal design review is not explicitly permitted by the Act. In actuality, these two processes simply allow municipal discretion to be used to delay developers who are not willing to negotiate with municipal authorities over matters of development design. The lack of a legal basis for design review is, as a practical matter, unimportant.

Comay Report recommends against a development permit system of control, proposing instead that the current development control system be made more effective.

Development permits vs zoning

In some jurisdictions (for example, Great Britain) a universal development permit system has been used in lieu of zoning bylaws. Every application for development is thus treated on its own merits; the nature of the building form and density are negotiated separately for each site; and there is no need for detailed development controls for sites prior to submission of an application for a development permit.

A universal system of development permits would be undesirable in a number of respects. The general reliance on discretionary control powers would inevitably result in less certainty as to potential land uses and permissible densities of development, both for owners of land and for neighbours; it would at the same time give relatively unlimited powers to regulators.(5) Whereas such uncertainty would be reduced by requiring permitted developments to conform to established planning policy statements, the necessity of negotiating the restrictions for every development would impose substantial additional costs and delays on all participants in a regulatory process. Moreover, where development control is being defined for areas that are stable, there is no need for the exercise of unrestricted discretionary powers in implementing area planning policies.

A more useful question is whether a development permit system would provide a better means of development control in areas which are undergoing substantial change. Such a system

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5 The British system is quite extreme in this regard, in that administrative discretion is subject to virtually no limits (other than to have non-exclusive regard to development plans along with any other material consideration) and is implemented in a system of controls far more all-encompassing than in Canada. For a useful review, see Makuch, "Zoning: Avenues of Reform", *Dalhousie Law Journal*, 1 (December 1973) 294-334.

is now used in Winnipeg, and was recommended in an earlier Ontario Economic Council report.(6) In that system, planning policy statements would designate the areas in which development permits are to be used and describe detailed criteria to be used in approving applications for development. Moreover, the use of development permits does not preclude the simultaneous use of zoning bylaws to define developments which may occur as a matter of legal right. A combined system would use zoning bylaws to establish a base zoning, presumably designed to encourage the redevelopment of small lots in a form generally consistent with current development in the area. In such a system most developments would fall within the base zoning provisions, and a development permit would be necessary only if the base zoning restrictions were to be exceeded.(7)

In many respects, such a system would not differ in practical effect from the current system, in which the official plan may allow for rezonings to achieve densities higher than those permitted as of legal right, and where approval of applications for rezonings is implemented through the de facto use of zoning agreements that may impose numerous additional conditions upon the developer. The primary difference would be that planning policy statements would only have to state qualitative criteria for the evaluation of applications for development permits and could avoid specifying the quantitative density controls necessary to reduce uncertainty about the form of development that might be allowed by a development permit.

Given that even in a system of development permits there should be a base zoning bylaw and that the reduction of

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6 See *Subject to Approval*, Ontario Economic Council, 1973, 114-16. The relevant provisions in the City of Winnipeg Act permit that municipality to designate areas in which development control is implemented through development permits rather than through zoning bylaws. A development permit system was also recommended in the earlier Milner reports for the Ontario Law Reform Commission.

7 Effectively, this results in a system in which normal uses within the area are regulated in advance through the zoning bylaw, so that subsequent formal council decisions on the density and planned uses of new developments are limited to exceptional projects.

uncertainty about potentially permissible uses is even more desirable, little is to be gained and much to be lost by changing from the present system of development control to a system of development permits in situations where rezoning is now used. Such a change would encourage municipalities to avoid dealing with planning issues and postpone planning decisions. As the Comay Report notes (paragraphs 11.5 and 11.6), the difficulty of establishing a complete set of development controls in areas where the desirable future form of development is uncertain is better dealt with through refining the existing system than by moving to a different institutional form of development control.

The Comay committee recommends "holding bylaws" which would, like a development permit system, allow postponement of regulatory decisions and so would be clearly differentiated from normal zoning bylaws; it also recommends broadening the scope and effectiveness of development review. These proposals will be discussed, along with the appropriate future role of the "normal" rezoning process.

Holding bylaws

The Comay Report proposes that, where a zoning designation differs from what is intended to be the permanent use by applicable planning policy statements, it should be clearly identified as a "holding bylaw". That would prevent citizens from being misled about the nature of the zoning. As the Report comments (paragraph 11.9).

The use of holding zones is appropriate only if there are clear and realistic rules as to the circumstances in which the hold will be released. Maintaining obsolete zoning or downzoning to grossly unrealistic levels can be seriously misleading in terms of public perceptions of the likely future; for example, the use of an agricultural designation for prospective urban lands is a practice that can be particularly misleading.

Designating holding bylaws would show not only that the eventual designation for an area is uncertain but also that a

rezoning is required in order to permit an economically viable redevelopment of the site. The importance of the second consideration should not be underestimated.

Holding bylaws should not be confused with interim controls that may be enacted for all or part of a planning area in order to freeze development while policy changes are being worked out. The role and use of interim controls are discussed below.(8)

The Comay Report proposes (paragraph 11.19) that the Planning Act establish the basis on which holding bylaws may be enacted and limit the power to enact holding bylaws to two situations: rural lands on which it is proposed to allow urban development subsequent to the provision of municipal services, and specific properties where the impact of development cannot be established in advance and regulated by quantitative standards. In both cases, quantitative development controls would not be specified in planning policy statements applicable to the area or site. A municipality would have to adopt a planning policy statement outlining the objectives of a holding bylaw and the reasons for its application to that specific site. A municipality would also have to specify the criteria to be used by council in considering applications for a permanent zoning designation. In effect, the use of holding bylaws would be a development permit system of highly restricted application, in that detailed quantitative restrictions on development would not be given either in zoning or in planning policy statements prior to negotiation with a developer in response to an application.

Holding bylaws in rural areas serve a very different

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8 See Section 8.2. Interim controls simply allow careful study of intended changes in planning policies that would otherwise have to be adopted immediately in unstudied form and then subsequently modified. By contrast, holding bylaws are meant to permit an indefinite postponement of planning analysis until there is a specific development proposal for the affected areas. The two instruments have often been confused because of the variety of meanings assigned to the term "holding bylaw". The terms used in this report correspond to those used in the Comay Report.

purpose from those in an urban context.(9) Rural holding bylaws simply allow postponement of detailed planning decisions until municipal services are provided, recognizing that development will not be feasible before servicing.(10) Their use in this context would help communicate to citizens the nature of the intended policy.

The Comay Report proposes (paragraph 11.19) to limit by statute the categories of urban planning situations in which holding bylaws may be enacted to environmentally sensitive land (such as land adjacent to ravines) or locations with extraordinary design requirements. The use of holding bylaws in these restricted categories would be a kind of development permit system with a provision for temporary base zoning that need not be viable as a permanent zoning designation. This use of a de facto development permit system for sites with unusual planning problems would among other things imply that a developer is clearly entitled to a receptive municipal response to a development proposal that is sensitive to the qualitative planning criteria specified in applicable planning policy statements or in provisions of the holding bylaw. In this respect the use of a holding bylaw should imply more of a municipal commitment to subsequent redesignation than currently exists in the rezoning procedure.

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9 This difference in purpose is in part a result of the nature of the subdivision approval process which is used to regulate the conversion of agricultural land to other uses. Subdivision approvals are entirely based on the exercise of discretionary powers by provincial and municipal authorities. The subdivision approval process is discussed later in this chapter.

10 An alternative approach could be considered: namely to specify in planning policy statements that designated land is to be zoned as agricultural pending the installation of municipal services, and that detailed planning policies for the redevelopment of such land will be specified by the adoption of a new planning policy statement on or before the installation of services. In this alternative, it would still be appropriate for the interim zoning designation to be identified as a holding bylaw, and explicitly recognized as such in the Act. Since both this alternative and the Comay proposal would have essentially the same effect, both should be allowed for in the Act and subjected to the same process requirements. Because of the lack of quantitative restrictions in planning policy statements authorizing holding bylaws, the approval of new zoning designations should be subject to the same procedural requirements as the adoption of new planning policy statements.

The Report proposes (paragraph 11.20) that holding bylaws should specify base zoning designating the uses permitted as of legal right, the uses that will be permitted by site-specific amendments to the zoning bylaw and the criteria to be employed by council in evaluating applications for rezonings. It would appear (from paragraphs 11.19 and 11.20) that the Comay Report envisages that the municipality will adopt a single planning policy statement setting forth the conditions under which holding bylaws will be enacted for specific sites, together with the general objectives to be achieved by rezoning, and that the decision criteria required to implement these general objectives will be specified for each site in the holding bylaw. Since this procedure has no clear advantage over adopting separate planning policy statements for each site, it would be better simply to have the decision criteria to be followed in evaluating applications for rezonings outlined either in the holding bylaw or in a policy planning statement for the site.(11)

The role of "normal" rezonings

In evaluating the Comay proposals as they apply in urban areas, it is necessary to make assumptions about the likely future of rezoning. The process is heavily used, and misused, as an implementation technique in the current system. The Comay Report is highly unsatisfactory in its comments on the misuse of rezoning; it does not deal explicitly with the problem and seems to overstate the extent to which the holding bylaw approach could substitute for the legitimate use of the rezoning process. In effect, it assumes there are three situations development controls must deal with, differentiated by the extent to which control problems are predictable:

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11 This would permit a municipality to use site-specific plan amendments as a means of protecting citizen participation in the review of rezoning applications. If the proposal advanced in Section 6.2 for expedited approval of "special" site-specific official plan amendments is accepted, this would be an obvious place where a municipality might elect to provide for them.

- Situations where there is no uncertainty as to the nature of controls which are desired; these may be completely regulated through the zoning bylaw.

- Situations where there is no uncertainty as to permissible use, height, and density, but in which important supplementary controls that may be needed cannot easily be specified in advance; these may be regulated in part through the zoning bylaw and in part through the exercise of discretionary development review powers. Rezonings would not be required.

- Situations in which the permissible height and density cannot be determined in advance; these would be regulated through the use of holding bylaws identified as such.

It thus seems implicit in the Comay proposals that densities and uses envisaged by planning policy statements should be available to developers as of legal right except where explicitly identified holding bylaws are enacted.(12) However, it recommends no legislative change that would cause this principle to be reflected in municipal planning actions, in part because of the loose connection envisaged between zoning designations and corresponding planning policy statements.

A fourth, intermediate situation should be added to the three implicitly allowed for by the Comay Report. This fourth category would allow for circumstances in which rezonings as now normally utilized may be appropriate. "Normal" rezoning is unlike the use of holding bylaws in that the base zoning designation should be viable as a permanent designation, and the uses and maximum densities attainable through rezoning should be outlined in quantitative terms in adopted planning policy statements.

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12 See paragraph 11.6 and 11.7. It should be noted that the Comay Report does state (paragraph 11.27) that a municipality would be permitted to retain "obsolete" zoning if it chooses under its proposals. However, the report clearly regards such practices as contrary to the public interest through obfuscating the nature of such control. As it (correctly) notes, interim control should be carried out directly, not indirectly. Futhermore, the retention of "obsolete" zoning is permitted by the Comay proposals only because they do not require planning actions to conform to adopted planning policy statements. If the current requirement for strict conformity were not only retained but strengthened, as is recommended above in chapter 6, obsolete zoning would have to be brought into conformity with newly adopted planning policies if it is truly obsolete in the sense of being inconsistent with stated planning objectives.

This situation differs from one in which holding bylaws should be used, in that it is possible to determine quantitative density and use restrictions before reviewing a development proposal.

Two urban planning situations fall in this fourth category. The first of these occurs where it is necessary to allow for relatively incompatible uses coexisting in an area. In that case it may be appropriate to zone most or all of the lots in a mixed area to allow existing uses but to allow redevelopment to one of the other uses only if a number of qualitative criteria are satisfied.(13) In effect, quantitative development controls may be specified in advance for each use in the area, but it is necessary to subject changes in use to controls that cannot be fully prespecified.

The second occurs where it is desirable to differentiate between what should be available as of right to developers of small lots and what may be appropriate if lots in an area are assembled and developed as an integrated site. In this case it would be desirable to assign a base zoning appropriate for separate development of individual lots but to provide in corresponding planning policy statements that additional density may be permitted on application by an owner provided that certain qualifications are satisfied. This situation differs from that covered by holding bylaws in three significant respects: aside from the fact that higher densities may be consistent with planning objectives for an area only if lots are assembled, the design requirements for development of assemblies need not be "extraordinary"; quantitative restrictions that may be applicable to a large assembly of lots may be capable of determination in advance; and the base zoning that may be utilized by owners of

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13 An example would be an area containing a mixture of housing and small industries, which may be relatively stable but in which it may be desirable to provide for the possibility of transitions in use. Such areas are not uncommon in the older parts of urban areas. In such cases it is clearly best to minimize the use of zoning which makes existing uses non-conforming. At the same time it would be desirable for planning policy statements to provide for control of transitions in use and to specify quantitative density restrictions conditional on the type of use.

individual lots should be viable as permanent zoning for new development in the absence of an assembly. Although a fair amount of certainty exists in this second case as to the best kind of development, it is not feasible in advance of an application for a specific site to determine the particular design controls and density limits appropriate for all possible assemblies. "Normal" rezonings are thus necessary to deal with this problem. The approval of densities higher than those provided as of right in base zoning should require citizen review, for the reasons stated in paragraph 9.6 of the Comay report.

In order to allow explicitly for such intermediate situations and at the same time to clarify the role of holding bylaws, it would be useful to provide in the Planning Act that densities and uses permitted as of right in zoning bylaws other than holding bylaws may differ from those in corresponding policy planning statements only where such differences are required to meet planning objectives specified in adopted planning policy statements. Moreover, planning policy statements which allow densities higher than those specified in the zoning bylaw or changes in permitted uses should have to state the qualitative restrictions which must be satisfied by an application for rezoning. These requirements, together with others for prespecification of planning policies, would prevent unjustified use of rezoning.(14) They would limit its normal use (i.e. other than where holding bylaws are enacted) to situations where the attainment of prespecified uses or density limits is conditional on the satisfaction of planning criteria which may only be prespecified in qualitative terms.(15) In effect, this would confine the use of holding bylaws to more difficult planning situations where attainable density limits on particular sites cannot be prespecified even in planning

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14 A general requirement for prior adoption of planning policy statements that provide for planning actions is proposed by the Comay Report (paragraph 6.9). The implementation of this and related proposals has been discussed above in section 6.2.

15 It should also be required that in situations where rezoning is used (i.e. other than in holding bylaws) the uses and densities provided as of legal right should be reasonable permanent designations.

policy statements, without at the same time precluding the use of rezoning in intermediate situations.

Failure to provide for the use of the rezoning process in such situations (either explicitly as proposed or implicitly as discussed below) would seriously limit the ability of a municipality to deal effectively with situations of intermediate uncertainty. A municipality would then be forced either to rule out the potential development of a site at higher densities or to accept the risk that development at the higher densities may violate planning objectives in an area if allowed as of right.

It should be emphasized that the Comay proposals suggest only implicitly that zoning bylaws should assign densities as of right which are permitted by planning policy statements. An alternative way of dealing with the intermediate situations discussed above (presumably that assumed by the Comay committee) is to make no provision in the Act concerning the relationship between zoning bylaws and the corresponding planning policy statements, and simply to assume that "conformity" will, as in the past, be interpreted by the courts to imply that densities specified in planning policy statements are upper limits on densities assigned in zoning bylaws.(16) Since the Comay Report makes no recommendation to the contrary, it has presumably adopted this approach.(17) But there is then little point in providing for an explicit definition of holding bylaws.

Development review

The review powers now provided by Section 35a of the Planning Act give municipalities control of a number of design

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16 See chapter 4, note 6. In the case of the Comay proposals conformity is not even required, though it is proposed that zoning bylaws be required to have regard for adopted planning policy statements.

17 This alternative approach, though consistent with the Report's proposals for the legal status of planning policy statements, is not consistent with the declared "principle" that zoning designations should not normally differ from planned designations except in the case of holding bylaws.

and operational features, provided that such controls do not keep a developer from obtaining uses, densities, or heights permitted by the zoning bylaw. Building height, density, and use are specifically excluded from Section 35a review.

The matters which may be reviewed in this way are presently confined to a list itemized in Section 35a(2) of the Planning Act, although in fact additional matters are often also reviewed. The Comay Report proposes (paragraph 11.40) that the Act be restructured to define the scope of development review and the conditions afterwards imposed in terms that conform to current regulatory practice. It proposes that the Act restrict the exercise of development review to the following four aspects of development: urban design, environmental impact, vehicular and pedestrian access and circulation, and the operation and maintenance of facilities for public use. It further recommends (paragraph 11.39) that the Planning Act require municipalities engaged in development review to have adopted a formal planning policy statement for each affected area that states the objectives to be achieved by development review and the criteria that will be used in evaluating specific proposals.(18) These proposals would allow the flexibility required in site-specific control and should be supported.

Although the Comay Report advocates that the scope of development review be broadened, it recommends (paragraph 11.50) against extending it to building height and density. The purpose of this restriction (which would continue the provisions of Section 35a(3) of the Act) is to keep the review process from creating uncertainty about the permissible density of development provided by the zoning bylaw. However, the shape of a building and the location of its higher portions may

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18 The Report proposes (paragraph 11.43) that a municipality should be able to amend this planning policy and to employ the amended criteria retrospectively to particular development proposals that have not been already approved in principle. Some provision of this kind would be necessary to allow sufficient flexibility to municipalities to deal with unpredicted aspects of a development. Failure to provide such flexibility would encourage municipalities to continue to rely on rezoning to retain the ability to deal with unforeseen problems.

be important components of its impact upon neighbouring properties.(19) The uncertainty created by Section 35a(3) about whether such matters may be regulated through development review encourages municipalities to continue to rely on rezoning where such controls may be needed.

A better approach is needed to limiting the use of development review powers in regulating height. One alternative is to provide that in using development review a municipality may not limit the height of buildings on more than 50% of a site nor regulate variations in building height on a site so as to preclude the achievement of densities permitted by the zoning bylaw.(20) A second, less satisfactory, alternative would be to stipulate that the review of height could not be used indirectly to regulate density.(21) Either alternative would allow development review powers to be used to control building envelopes and angular planes without compromising the attainability of densities assigned by zoning bylaws.

Because development review is expensive to administer and a source of delay to builders, its applicability should be limited to cases where it is needed. Although the Comay Report recommends (paragraph 11.51) that criteria for exemption from development review be specified in the Planning Act, such

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19 To some extent, these matters may be addressed under powers provided by paragraph 11 of Section 35a(2) of the Act which are not limited by Section 35a(3). However, this interpretation of paragraph 11 could clearly be subject to challenge in the courts.

20 Such a provision would ensure that height limits specified in the zoning bylaw may be achieved as of right on 50% of the site area and that such specified height limits would constitute upper limits on height on the remainder of the site area.

21 The difficulty with the second alternative is that it is not capable of clear interpretation in sites in which density is controlled in terms of numbers of dwelling units or some other variable not directly related to floor space area. In such sites the regulation of height in the development review process might not preclude the achievement of permissible densities as defined by the zoning bylaw, but would nevertheless inevitably limit achievable density expressed in terms of gross floor area.

exemptions should rather be set out in municipal planning policy statements.(22)

Additional zoning tools

The Comay Report proposes that the Planning Act authorize the use of several devices for implementing planning objectives. These include: bonus zoning, transfers of development rights, zoning agreements, and temporary use zoning. All four have been used in restricted instances, but the Report would make them generally available to municipalities.

Bonus zoning allows additional density if stated conditions are satisfied, such as the inclusion of assisted housing in a development.(23) Since the density bonus is obtainable by right, rezonings would not be required. The Comay Report proposes (paragraph 11.33) that the Planning Act authorize bonus zoning for any purpose provided that a municipality has adopted a planning policy statement establishing the objectives of bonusing and defining the conditions in which the bonus is to be awarded. It also recommends (paragraph 11.34) that the Act allow agreements between municipalities and developers to provide for continued enforcement of the conditions under which the bonus is awarded.(24)

In many instances bonus zoning may prove useful. These include the encouragement of assisted housing, the provision of additional public open space, the preservation of house form

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22 For example, it may be appropriate to provide for intra-municipal variation in exemptions, with fewer allowed in areas where urban design problems may be of particular importance (e.g. areas of small-scale development surrounding historical buildings or in streetscapes of special character). If exemptions are specified as proposed in paragraph 11.51 of the Comay Report, municipalities should be permitted to designate "Areas of Special Identity" in which such exemption standards may be varied.

23 Such a system has been used for this specific purpose in Toronto, pursuant to special enabling legislation enacted in 1975 as an amendment to the City of Toronto Act. It is also used extensively in New York City, where a development earns density points to the extent that it satisfies each of a number of listed criteria.

24 It may be appropriate also to provide in the Act for means by which enforcement may be made effective, such as registry of the agreement against title.

buildings in an area (allowing additional density to be constructed in the form of rear additions) or the preservation of buildings of historical or architectural importance. It can be a very effective way of attaining planning objectives, because while incentives to these ends may be implemented through rezonings, the additional time taken by rezoning may make it too costly except when it is required for other reasons.

Transfers of development rights are another valuable tool.(25) The Comay Report proposes (paragraphs 11.30 and 11.31) that such transfers be authorized, with limits specified in planning policy statements, and that the mechanics of them be provided for in the Act. It urges that transferable development rights be authorized for four listed purposes: preservation of privately owned open space, retention of buildings of significant historical or architectural merit, retention of significant civic design features (such as axial views), and amelioration of problems arising in the implementation of mixed-use zoning for small lots. Density transfers would allow these four planning objectives to be implemented more efficiently and with greater equity. For example, many sites containing historic buildings are too small for additional development, so that bonus zoning incentives are not effective when limited to the site. The alternative of buying the site is often not practical. The ability to transfer development rights (potentially including bonuses) to other sites within some defined area such as a zoning district is an incentive for preservation.

Zoning agreements, though widely used, are currently of uncertain legality. The Comay Report (paragraphs 11.22 and 11.24) wants them recognized and provided for in the Planning Act, with municipalities authorized to require the posting of

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25 An example is the implementation of objectives for mixed-use development in certain areas. Such objectives may be achieved with less construction cost if adjacent buildings are restricted to different uses, subject to being "mixed" in the aggregate. Transferable development rights allow such transfers to be made by owners of small lots and so eliminate an unnecessary inducement for the assembly of lots where such assembly is not desirable on its own merits.

bonds to ensure fulfilment of conditions.(26) However, the Report also proposes (paragraph 11.23) that zoning agreements be restricted to matters that may be the subject of development review; because this would discourage rezoning in situations where additional conditions are deemed necessary, it should not be supported. Since zoning agreements (along with the rezoning itself) would be subject to provincial review, it seems unnecessary to restrict their terms.(27)

As an additional tool, the Report recommends (paragraph 11.25) eliminating restrictions on the use of temporary zoning bylaws (which are now limited to the establishment of temporary zoning for parking purposes). Instead, it says, reviewable temporary zoning bylaws should be authorized, provided that non-conforming use status cannot be secured as a result of the temporary bylaw.

Limiting the amount of development

The zoning bylaw, together with development review and the additional zoning tools discussed above, regulates the way land is developed but not how quickly. In rapidly growing areas, it may be advisable to control the rate of growth in particular areas to direct development elsewhere.(28) While such controls may be implemented by holding bylaws in rural areas, holding bylaws are not appropriate for this purpose in cities, primarily because of the uncertainty they create about future development on particular sites. The role of holding bylaws in urban areas should be limited to the designation of sites with

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26 It would also be useful to provide in the Planning Act that any such agreements are enforcible against persons deriving title from the person with whom the agreement is made; Section 37 of the UK Town and Country Planning Act 1968 c. 72 provides a model.

27 However, it is necessary to allow appeal by developers against conditions that are overly onerous. This matter is dealt with in the next section.

28 Such redirection of development is of particular importance in regional planning policies. For instance, the draft official plan for Metropolitan Toronto calls for the redirection of growth in office employment to suburban centres to provide the economic base for a transit-oriented transportation system in suburban parts of the metropolitan region.

exceptional planning problems for which suitable controls cannot be specified before a design is submitted.

Methods of controlling the aggregate quantity of development in urban areas are not discussed by the Comay Report, an important omission. To provide for such control, a device is needed to supplement the site-specific controls in the zoning bylaw. A system of development licences could require that, within a designated area, a building permit be issued only to a developer in possession of licences for the construction of new space in that area for particular uses.(29) (An applicant for a building permit would of course also be required to conform to site-specific regulations in the zoning bylaw.) Such licences could be issued in a number of ways (for example, by lottery or by auction), but should be transferable in order that a market in them may be organized to allow their reallocation to the most effective use.(30) To implement this system the Planning Act should authorize municipalities to control aggregate construction of space for defined categories of uses in designated areas through the issuance of development licences. The licences should be assignable to others in whole or in part and should also be registered. Municipalities could be empowered to sell them through a competitive auction, subject to normal provisions of public notice. Alternatively, a municipality could issue a development licence to every property owner in the designated area for a pro rata share of the aggregate permitted quantity of development, with the amount of development allowed by the licence proportional to the difference between the total density permitted on that lot by the zoning bylaw and the current density of buildings on the lot. In this

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29 For example, if the policy objective were to regulate the aggregate amount of new office space constructed in a mixed-use area and if a development licensing scheme were implemented for this purpose, licences would be issued permitting specified amounts of office space. A developer wishing to develop a building containing office space would then be required to obtain licences for that quantity of office space. However, a project that included only other uses (e.g. residential plus retail commercial) would not require a licence.

30 Unlike transferable zoned development rights, development licences need not be registered against land titles and so may be traded separately from land. Trading in licences would enable market forces to effect the most efficient uses of them.

case a market in such licences would enable them to be sold by recipients to property-owners wishing to utilize them.

The regulation of aggregate development through development licences would have to be consistent with an adopted planning policy statement defining the area and the uses regulated. That statement should also outline the objectives, the aggregate amount of new development to be licensed each year, and the manner in which licences are issued. The effectiveness of such regulation would have to be monitored systematically, and conditions under which Council would be required to review the policy should be stated.

As long as development licensing is novel and untried, it might be restricted to selected municipalities. At least for an initial period, the Planning Act could assign the minister authority to empower use of the system by a specific municipality, on application by that municipality.

8.2 THE DEVELOPMENT CONTROL PROCESS

As indicated earlier, greater efficiency may be introduced by taking advantage of a hierarchy of planning instruments, provided the hierarchical relationships are strong. The following proposals depend on strict conformity of implementing regulatory actions to adopted planning policy statements. Since the Comay Report envisages only a loose connection between implementing regulations and planning policy statements, it does not distinguish between adopting a planning policy statement and a zoning bylaw. However, strict conformity could be achieved with the recommendations made to that end in chapters 4 and 6.

Procedural requirements for zoning changes

The general procedures prescribed in Section 6.3 for planning actions should clearly apply to all changes in

regulatory instruments.(31) The Comay proposals focus on adequately protecting the rights of affected parties when changing regulatory instruments. Though minor modifications of these proposals have been suggested, the committee's proposals would significantly improve the regulatory process. The additional protections proposed in chapters 4 and 6 for the adoption or amendment of planning policy statements should not generally apply to changes in zoning bylaws or other regulatory instruments. Any choice of process involves a tradeoff between the protection of citizens' rights and the economic costs of regulation on the other. To have greater protection of citizens' rights in the adoption of planning policy statements than in every regulatory decision is one way of making this tradeoff potentially more efficient.

An exception must be made for holding bylaws. Because they postpone policy choices until an application for a development is submitted, the approval of an application for a permanent designation to replace a holding bylaw should be treated as equivalent to the adoption or amendment of a planning policy statement.

The distinction between policy decisions and implementing decisions should also be made by the province in responding to objections and appeals. A regulatory decision that conforms to planning policy statements should not be disallowed unless it can be shown that the policies are inappropriate in some respect, in which case they should be changed. Accordingly, although grounds for objection and appeal should not be constrained, the Ontario Municipal Board, in assessing an objection to a regulatory decision, should have particular regard for whether the appellant is able to show

- ¶ that the council, in making a regulatory decision, did not follow proper procedures (as defined by provincial regulations and municipal planning policy statements) or was provided incorrect or incomplete advice prior to its decision.(32)

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31 Development review is assumed to involve the application of a regulatory instrument and is discussed separately in a later subsection.

32 The meaning of "incorrect or incomplete advice" should be as described in paragraph 10.15 of the Comay Report.

- ¶ that the regulatory decision is not in conformity with planning policy statements adopted by the municipality; or

- ¶ that municipal planning policy statements to which the regulatory decision conforms are imprecise or deficient in some important respect and should be reviewed.

Municipal Board findings and recommedations concerning procedural deficiencies should be dealt with as described in Sections 4.3 and 6.4, that is, the matter should be returned to the municipal council for a new decision.

Where the Municipal Board finds that council's regulatory decision is not in conformity with planning policy statements adopted by the municipality or that the relevant municipal planning policy statement is imprecise or deficient in some repect, the regulatory decision should be voided. No further review process would be necessary in such cases.(33) It would of course be possible for the municipal council to undertake a review of the relevant planning policy statements and, subsequent to such review, to adopt policy statements that would permit the voided regulatory decision.(34) However, the adoption of such planning policy statements would then be subject to the procedural safeguards discussed in earlier chapters.

The proposed criteria for Board assessment of objections differ significantly from those proposed in the case of planning policy statements in chapter 6. In effect, they restrict the grounds for objecting to a zoning change or other regulatory decision. Where the decision conforms to adopted planning policy statements, the objector would be obliged to show that there were reasonable grounds to require the municipality to

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33 Other than in cases where a party to a Municipal Board hearing may appeal the Municipal Board decision on procedural grounds. Such appeals would presumably be rare; the process for such appeals is proposed in chapter 4, note 24.

34 To prevent pre-emptive development during such reconsideration, it would be necessary to provide that the voiding of the regulatory decision not take effect for sixty days thereafter. This would allow the municipal council to adopt the required planning policy statement or, alternatively, to adopt an interim control bylaw to permit more extended review. Sixty days would make possible effective citizen participation in the decision.

review the relevant planning policies before confirming the regulatory decision. Reflecting this, the Board should specify the policies that should be reviewed if it finds for the objector.

So far we have considered the appeal rights of affected parties objecting to a municipal regulatory change to allow a development. It is also necessary to deal with the rights of a prospective developer applying for such a change. As noted earlier,(35) the Robarts commission suggested (recommendation 11.7) that an applicant be entitled to appeal to the OMB for an order forcing the municipality to decide on the application within a deadline prescribed by the Board. Section 35(22) of the Act sets forth arbitrary deadlines which in some situations are obviously unrealistic. The Act should allow appeals to the OMB against undue municipal delays, with the meaning of "undue delay" to be interpreted by the Board in the light of each situation.

Beyond this, how far should an applicant for a regulatory change be able to appeal against a rejection of his application? Such an appeal should neither in legislation nor in practice be confused with an appeal against undue delay in municipal decision-making nor with an application for review of applicable planning policy statements.(36) Presuming that an application for a regulatory change conforms to adopted planning policy statements, the question is whether a rejection of the application should be reviewable.

The Act should of course provide that an applicant for a regulatory change may appeal against municipal rejection of the application on the grounds that the council, in making its decision, did not follow proper procedures or was provided incorrect or incomplete advice. On hearing such an appeal, the

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35 Section 6.2 above. The Comay Report proposes minor modifications of the existing legislative provisions for appeal.

36 Provisions for citizen-initiated reviews of planning policy statements deal only with the question whether a municipality should be required to undertake a formal review of planning policies. The outcome of such a review should be entirely the responsibility of the local municipal council, subject only to procedural safeguards.

Municipal Board should be empowered to order the municipal council to re-hear the application. In addition, an applicant should be permitted to appeal to the Board on the ground that a council's rejection of his application does not conform to adopted planning policy statements. In such cases the board should be empowered to find that the criteria presented in such statements are unclear or that the project appears to conform to the stated criteria. Where it finds that the applicable criteria do not provide clear guidance, it should direct the municipality to amend applicable policy statements so that the reason for rejecting the application is clear. Where the OMB finds that a rejected project appears to conform to rezoning criteria stated in applicable planning policy statements, the municipality should be directed either to approve the application or to review and modify the planning policy within a reasonable period to make it conform to the intent of council. In either case, the decision of a council to reject an application should not be revoked by the Municipal Board.(37) However, in all cases, the procedure followed should at least ensure that planning policies are clarified to provide more certainty as to their intent.

The Comay Report expresses concern (paragraph 11.26) about the possibility that regulatory bylaws may be obsolete, presumably in the sense that they are no longer in full conformity with planning policy statements, and proposes mandatory council review of regulatory bylaws at least once every five years. This concern would be more effectively dealt with by providing that all regulatory bylaws must be brought into conformity with

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37 This conclusion reflects an assumption that the evaluation of qualitative criteria applicable to a rezoning should be the exclusive responsibility of the municipal council. Nevertheless a strong case can be made for allowing appeals to a higher authority on grounds that a rejected rezoning application conforms to the criteria specified in planning policy statements. If appeals are allowed on this substantive ground, the Municipal Board findings and recommendations should be first returned to the municipal council for its consideration; a further appeal to the cabinet should then be permitted only on the ground that the municipal council did not seriously consider the Board's report.

any newly adopted planning policy statements.(38) This proviso could be strengthened by allowing citizens to obtain judicial orders to this effect.(39) The regulatory bylaws by which planning policies are implemented should be reviewed concurrently with any review of planning policy statements. The Comay Report's idea of a mandatory review every five years should thus not be supported.

Intermunicipal disputes over implementing actions

With a hierarchical relationship between planning policy statements and implementing regulations, the resolution of intermunicipal disputes can be made more efficient. In general, they would be focused on planning policies, rather than on regulatory actions that conform to those polices, because they should be resolved when a local policy is adopted and not be separately adjudicated for each site to which it may apply. Nevertheless, the full implications of a planning policy for any adjacent municipality may not be clear until illustrated by an implementing decision. For this reason the rights of notice and objection extended to councils of adjacent municipalities should apply to all planning actions, not just to planning policy statements.(40)

Attempts to resolve intermunicipal disputes in the context of planning policy statements must allow for subsequent objection to unanticipated implications of policy. To focus subsequent objections on the policy differences between municipalities, the objecting municipality should have to detail how

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38 Proposals to this end have been detailed in chapter 6. Such requirements would not preclude use of rezoning, provided that planning policy statements explicitly allow it.

39 This would parallel the Illinois provision described in chapter 1, note 16. It would be appropriate to require citizens' legal costs to be paid by the defending municipality in cases where applications for judicial orders were successful.

40 Limited provisions for notice to adjacent municipalities are now provided by Section 35(16) of the Act. However, these only apply when a zoning action applies to property actually abutting the adjacent municipality. Proposed notice requirements are listed in Section 4.4.

the planning policy statements of the municipality which made the decision should be changed. Accordingly, where an adjacent municipality objects to an implementing action, it should be required at the same time to appeal for an amendment of the local planning policy statement that would preclude the action to which objection is being made.(41) Provincial adjudication of the matter should then resolve the underlying policy dispute so that it will not recur.

Similar comments apply to objections by upper-tier municipal councils to implementing actions undertaken by local municipalities within a two-tier regional government. In this case, however, the nature of the intermunicipal dispute is made somewhat more complex by the hierarchical relationship between regional and local planning policy statements. The ability of regional councils to object to local implementing actions should be restricted by the Planning Act to situations in which the local planning action does not conform to adopted local planning policy statements or the local planning action is in conflict with adopted regional planning policy statements, even though it is in conformity with local planning policy statements. Presumably, an objection on the first ground could be easily adjudicated, since a hearing on it would not require review of the merits of the relevant planning policy statements. An objection on the second ground would generally occur only where a potential conflict between local and regional planning policy statements was not foreseen at the time of their adoption, and so should cause a review and resolution of the conflict.

As noted earlier, upper-tier councils should have the right to request a local municipality to amend local planning policy statements either to delete or modify policies that conflict with adopted regional planning policy statements or to include specific provisions of regional interest. Where a regional municipality objects to a local planning action that

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41 This statement assumes the action objected to conforms to local planning policy statements. An adjacent municipality (like any other affected party) should also be able to object to an implementing action that does not conform to adopted planning policy statements.

conforms to local planning policy statements which the regional council has not previously requested be amended, the regional council should at the same time request appropriate amendments of the local planning policy statements and identify the specific regional planning policy statements with which the local planning action is in conflict. Under the presumption that the conflict could not be anticipated at the time the regional planning policy statement was adopted, the Planning Act should allow the local municipality to lodge a counter-objection and to appeal to the province for a modification of the regional policy that would resolve the conflict in favour of itself.(42) These proposed provisions would ensure that an inter-tier dispute is resolved at a policy level and not be repeated site by site.

Objections to municipal planning actions by other municipalities should be heard by the OMB, which should forward its findings and recommendations to all affected councils. If actions acceptable to all affected councils are undertaken by the municipality (or municipalities), the dispute would be resolved. Otherwise, on appeal by one or more of the affected municipalities, the dispute would be resolved by the provincial cabinet. The Planning Act should, as in other intermunicipal disputes, empower the cabinet to issue an order modifying the planning policies of any appealing or defending municipality where necessary to resolve the dispute.(43)

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42 A modification of the regional policy in favour of the local municipality could take either of two forms: a modification that applied to all local municipalities within the two-tier regional government or an exception from the general policy for the objecting local municipality.

43 Such an order should also provide a definitive resolution of the regulatory action which caused the original objections. The Act should consequently require the cabinet, in issuing an order resolving inter-municipal disputes over a municipal regulatory decision, both to make such modifications of municipal planning policy statements as are needed to resolve the dispute and also to decide whether the regulatory decision (as amended by the municipal council in responding to Municipal Board findings) is in conformity with municipal policies as so modified. Where the regulatory decision appealed by other municipalities does not conform to municipal planning policy statements as thus modified, the Act should empower the provincial cabinet either to veto it or to modify it to bring it into conformity with such policy statements.

Procedural requirements for development review

The nature of development review can range from concern with very significant aspects of urban design to relatively mundane matters. Consequently, it is difficult to be categorical about the appropriate procedures to be followed. In some situations, development planning problems that have significant potential impacts on neighbouring properties may be dealt with by development review rather than rezoning, provided that development review can make it possible for potentially unfavourable impacts on neighbouring properties to be minimized. Other development review situations involve relatively straightforward applications of criteria that can with relative ease be prespecified, particularly when they apply to the redevelopment of small sites. It is thus unreasonable to require that all development reviews be subject to the procedural safeguards which apply to rezonings. Nevertheless, minimal procedural safeguards are needed to keep affected parties informed of development review actions and their relation to planning policy statements.

The Comay committee was unable to reach agreement on the degree to which the development review process should provide for citizen participation. A majority of the committee recommended that there be no provisions for public notice and hearings on development review applications. A dissenting minority recommended that development review be subject to the same procedural requirements as other planning actions. In view of the potential variety of review situations, municipalities should, in enacting planning policy statements containing the objectives and criteria of development review, specify the nature of public participation in review decisions. This would allow greater public involvement on sites where such involvement may be desired.(44)

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44 Such flexibility in the definition of the development review process may permit it to be used where rezoning is now used to provide public involvement in design review.

As a minimal safeguard for affected parties, the Act should allow any person eligible to receive notice of a site-specific rezoning in an area, by written request to receive notice of applications for development review in that area. While not subjecting review applications to the full requirements of notice and hearings imposed on other regulatory actions, this provision would enable an actively interested party (such as an association of residents or businessmen) to know of ongoing reviews.(45) In addition, any affected party should have the right to appeal to the OMB against a development review decision which does not conform to criteria specified in relevant planning policy statements.(46)

The Comay Report proposes (paragraphs 11.44 and 11.45) setting a maximum time limit within which development review decisions must be made. It recommends that at least a decision in principle (a so-called outline decision) must be made within sixty days of submission of an application, failing which an application would be deemed approved. Since this might cause partly unacceptable applications to be rejected out of hand because there is no time for modifications to be negotiated, it would probably not speed the processing of applications.(47) However, in order to allow some way of appealing unreasonable municipal delays, it should be provided that where a decision in principle has not been made within sixty days of an application for review, the applicant may appeal to the OMB for an

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45 It would be necessary for such a request to be filed with the clerk of the municipality. While such notice would not imply a right to a hearing as for other regulatory actions, it would allow affected parties to monitor the review process and request permission to appear before the relevant committee of council when the matter is being considered.

46 This should be the only ground on which objection would be permitted to a development review decision that approves a development. To implement this right of appeal, it would be necessary to provide that development agreements approved by councils be available for public inspection through application to the clerk of the municipality.

47 Indeed, by implicitly requiring negotiations to be processed through quick rejection of unsatisfactory applications and subsequent formal resubmission of revised applications, the review process might be made more cumbersome.

order stating the conditions which must be met by the applicant and directing the municipality to enter into a development agreement incorporating such conditions.(48)

The Comay committee received many submissions complaining about the delays and costs incurred by participants in the development review process, and its proposal of a sixty-day deadline for rejection of an application was the result. The disadvantages of this particular proposal obviously do not argue against attempting to reduce delays, although as the Report itself points out (paragraph 11.38), "It seems to us that if the costs are unreasonable, this stems from the fact that the legislation does not require municipalities to establish a suitable planning framework, and does not set out adequate rules for the conduct of development review." Because development review powers are now typically exercised on an impromptu basis, with review standards being developed after applications are submitted, expeditious review is not feasible. The most fruitful way of accelerating the process is to encourage the development of detailed design standards, at least for the development of smaller lots, implying automatic approval of a development that meets them.(49) This would limit negotiations between developers and municipal officials to cases which are complex (such as the development of large assemblies) or in which developers wish to proceed with designs

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48 This proposal is of course what is currently provided by Section 35a(6) of the Act, modified so that the time for review is more realistic. It differs from what is proposed for a zoning change primarily because in the case of development review decisions there should be a presumption that an applicant is entitled to be informed of the exact conditions to be satisfied in order for his application to be approved. This presumption is necessary to ensure that development review is not used as an indirect means of regulating use and density.

49 This of course requires that municipalities be authorized to deal with all matters of design relevant to the stated planning objectives. If municipalities may not explicitly deal with matters that are viewed as of critical importance, automatic approval requirements will tend to be made more stringent in order to subject a higher proportion of applications to the exercise of discretionary powers.

that differ from the models implicit in prespecified standards.(50)

It is difficult to require municipalities to develop detailed design standards as proposed above. The greater specificity in development review bylaws proposed by the Comay Report (paragraphs 11.39 and 11.42) would be helpful in this respect and should be adopted. However, the degree of specificity in criteria adopted in development review bylaws may not be sufficient to allow "standard" applications. Fortunately, it is very much in a municipality's interest to develop procedures that reduce the costs of development review, and that fact should encourage improvements.

Interim control bylaws

To preclude pre-emptive development of an area under existing regulations while a municipality undertakes formal study of proposals to reduce densities or to change uses, there has been a growing use of interim control bylaws which put a temporary freeze on development.(51) Such interim control serves an entirely different function from the holding bylaws discussed earlier in that it exists only as part of the process by which planning policies and implementing regulations are changed. Interim controls allow a fuller study of proposals before initiating the political process. Without time for study, a municipality might quickly adopt a set of ill-considered proposals, followed by lengthy objections and modifications. The unnecessary repetition of hearings at both the municipal and provincial levels would clearly be less efficient than the current use of interim controls.

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50 It may be noted that this procedure may have the unfortunate effect of discouraging imaginative design. It is difficult to find ways of setting design standards that do not have this potential side-effect.

51 This may currently be done in a variety of ways, including the adoption of intents to pass a bylaw and the adoption of formal interim control bylaws. A recent Supreme Court decision, moreover, has widened the perceived powers of municipalities to adopt interim controls; see *Sanbay Developments Limited* v *City of London et al.* (1974), 45 D.L.R. 3(d) 403.

The Comay Report proposes (paragraphs 11.13-11.15) that the current use of interim control techniques should be made formal by providing in the Planning Act for the adoption of interim control bylaws. The duration of such bylaws would be limited to one year from the date of adoption and subject to extension for a further year. A council having adopted a resolution of intent to enact an interim control bylaw, should have to hold hearings within thirty days to determine whether the interim bylaw should be enacted.(52) Failure to adopt the Comay proposals would not preclude the use of informal interim control devices, which is currently unrestricted, but it would also not prevent their misuse.

8.3 LAND DIVISION APPROVALS

The regulation of land division exists primarily to allow additional controls of the conversion of agricultural land to urban uses than are provided by the development control instruments described in Section 8.1. Other regulatory goals that might be implemented through land division controls, such as the regulation of infill development in urban areas, are implemented almost entirely by zoning bylaws.

The primary reason for using land division controls as a principal means of regulating urbanization is that development of land for non-agricultural uses has been generally assumed by purchasers of land to be a presumptive right if the size of a lot is too small for efficient agricultural use. Accordingly, even though the use and development of such land may in conceptual terms be controlled by zoning bylaws and other instruments, it has proved difficult to maintain zoning that precludes development once land has been divided into small lots. This practical difficulty would not be alleviated by any of the regulatory improvements discussed in the first section

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52 A deadline for a council decision on the adoption of an interim control bylaw subsequent to such hearings should also be specified in the Act.

of this chapter. Land division approvals are therefore the most important regulatory device available to control the conversion of agricultural land into non-agricultural uses, and the effectiveness of the process should be maintained.

The many problems in applying land division controls have arisen partly because to prevent evasion all land divisions in all parts of the province have been made subject to regulation and partly because the control process has become progressively more complex and time-consuming in an attempt to deal with potential development problems at the time land division is approved.

Land division controls include subdivision approvals (that is, the approval of the division of large properties into a number of smaller lots) and land separation consents (permitting the severance of an individual lot from a larger lot containing it); these are discussed in turn.

The subdivision approval process

The Comay Report recommends that subdivisions be approved at the municipal level, with the province having the power to review and veto municipal actions.(53) Where subdivision approval authority is assigned to local councils in two-tier governments, the regional council would have the power to review and object to subdivisions approved by a local council on the grounds of non-conformity to adopted regional planning policies.

The normal assignment of subdivision approval authority to municipal councils has a number of implications for the existing subdivision approval process. These are dealt with in the Comay Report and involve the following considerations:

¶ With the approval authority assigned to the municipal level, it is necessary to formalize the process of consultation which now occurs on a discretionary basis.

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53 Section 6.1 above. As noted there, the Comay report also proposes (paragraphs 4.15 and 4.20) that the minister should have authority to recall approval authority from municipalities where such authority is not exercised in a manner that is consistent with provincial objectives.

The Comay Report consequently proposes (paragraphs 12.9 and 12.10) that the agencies to which subdivision plans are to be circulated for comment should be specified by regulation, and that such regulations should stipulate a time limit within which agency comments are to be submitted. In order to provide in legislation for municipal balancing of conflicting concerns that may be expressed in agency comments, the report proposes further (paragraph 12.12) that the Act should provide simply that such comments should be included among the matters for which council shall have regard in considering a draft subdivision plan.

¶ At present, Section 33(4) of the Act lists a number of specific criteria to be considered in evaluating proposed subdivisions, but also provides a relatively general "residual criterion" that avoids any limitation on the criteria for which an approving body must have regard in considering a draft subdivision plan. The Comay Report proposes (paragraph 12.33) that this residual criterion be deleted and subdivision approval authority exercised only by municipalities which have adopted planning policy statements that provide a clear specification of the circumstances under which subdivisions should be approved.(54) Such planning policy statements should be able to provide an operational definition of all objectives to be achieved in approving subdivision plans.

¶ In order to provide for appeals to the province against municipal refusal to approve a subdivision, it is necessary that municipalities state the specific reasons why a subdivision plan is rejected. The Comay Report proposes (paragraph 12.47) that this be mandatory for all approving authorities, including the minister in cases where approval authority has been retained or recalled.

These proposals would ensure that the assignment of approval authority to municipalities would not detract from a consistent subdivision approval process across the province.

An advantage of assigning subdivision approval authority to municipalities is that such approvals may more easily be co-ordinated with the zoning changes that may be necessary. The centralization of planning authority in municipal councils

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54 This proposal is of course simply a special case of the Comay Report's general proposal (paragraphs 6.9 and 6.10) for the adoption of planning policy statements to be made a prerequisite for the exercise of regulatory authority.

may potentially be an important source of increased efficiency in the approval process.(55)

The decision criteria for which an approving authority must have regard are currently listed in Section 33(4) of the Planning Act. The Comay Report proposes that municipal planning policy statements should detail the situations in which subdivisions may be approved. Such specification should include the designation of areas in which agricultural land may be converted to other uses and detailed criteria that should be considered for any proposed subdivision. The Comay Report proposes (paragraphs 12.34-12.39) a number of improvements to the specific criteria in Section 33(4), and proposes that these be reflected in municipal planning policy statements applicable to subdivision approvals. The proposed improvements should all be adopted.

Because of the planning importance of the timing of development in different areas that may be suitable for conversions from agricultural to other uses, additional requirements beyond those proposed by the Comay Report should be adopted. Subdivisions should not be approved in areas which are subjected to holding bylaws that preclude such conversion. In effect, this would permit holding bylaws (and corresponding planning policy statements) to control the phasing of subdivision development. In addition, municipal planning policy statements governing subdivision approvals should indicate the sequence in which land is to be developed.(56)

The importance of the phasing of development in subdivisions is highlighted by concern about the provisions of clause

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55 The principal potential benefits of the Comay Report's proposal (paragraphs 12.3 and 12.4) for a subdivision development permit system should be achieved by the more important reform of assigning approval authority to municipalities responsible for development control. A subdivision permit system combining zoning and land division approvals in one regulatory instrument was previously also proposed by the 1969 Milner report for the Ontario Law Reform Commission; such a system would (from a procedural viewpoint) be easy to implement where zoning and land division decisions are made by the same municipal council.

56 These requirements would amplify the Comay proposals (paragraph 12.37) for a required specification of criteria of prematurity.

(i) of Section 33(4) of the Act regarding the adequacy of school sites. The Comay Report in discussing this concern (in paragraphs 12.44-12.46), focus on this issue solely from the standpoint of co-ordinating provincial housing and education policies. In fact planning considerations go beyond this; the relative costs of providing education and municipal services to different potential areas of development are legitimate municipal concerns and should be reflected in municipal planning; in general, municipal planning policy statements should have regard for differences in such costs in determining the appropriate phasing of housing development in different areas.

In order to provide for a more efficient approval process, the Comay Report recommends (paragraph 12.17) that the definition of draft approval (now an initial step in the subdivision approval process defined by Section 33(12) of the Act) be made more specific, and in such a way that draft approval constitutes approval in principle. To this end, it further proposes (paragraphs 12.18 and 12.19) that any outstanding issues in need of evaluation appear as conditions of draft approval. These measures would help reduce uncertainty resulting from the current use of "subject to approval" conditions, though they will not eliminate it, and should be endorsed.

Conditions for approval

The Planning Act currently permits the approval authority to impose conditions on final approval of a subdivision. These conditions may include the dedication of land for parks, internal streets, and highway widenings. They may also include the imposition of financial levies and the construction of municipal services which lie outside the boundaries of the subdivision.

The Comay Report strongly opposes subdivision levies or requirements for the construction of works outside the subdivision, remarking (paragraphs 12.21 and 12.22) that

Operating under this broad discretionary umbrella, many municipalities have had the minister impose conditions on their behalf which appear to have had a serious impact on the cost of

subdivision development and which raise serious questions of consistency and equity ... An unconstrained ability to impose conditions is wrong in principle, and contains great potential for harsh, inequitable, or even improper actions.

The Report therefore recommends (paragraph 12.23) that the approval authority be permitted to impose only conditions which it concludes are reasonably related to the need for facilities generated by the subdivision. It opposes (paragraphs 14.4 and 14.13) financial levies on subdivision developers that are used to pay for municipal facilities or services that are of general benefit to existing residents of the municipality.

Provided that the findings of a provincial review of a municipality's approved decision (including all conditions specified therein) may only be returned to the municipality for consideration, this proposal may not have a significantly negative impact on municipal planning. However, the province should not be empowered to modify a municipality's decision without providing the municipality with the opportunity to decide whether to approve the subdivision subject to the modified conditions. Accordingly, the Act should explicitly provide that, if the conditions of subdivision approval are modified by the province in response to appeal by the subdivision applicant, the subdivision approval may be withdrawn by the municipality.

Two important principles apply in such situations. First, it is entirely possible that under some circumstances a subdivision in a particular area is considered worthy of approval only if there is some extraordinary compensation in the form of benefits allocable to existing residents of the municipality. While it may be entirely appropriate provincial policy to preclude a municipality from making such compensation a condition of subdivision approval, it is not appropriate to require a municipality to approve a subdivision which, in the absence of such compensation, is viewed as undesirable. Second (a corollary of the first), it is extremely difficult to determine all the social costs attributable to a new

subdivision.(57) The restriction of a municipality's ability to impose levies or conditions on subdivision approvals will inevitably be a disincentive for subdivision approval. Any consequent reduction in subdivision approvals will have an effect on land costs that is no less significant for not being explicitly defined in a subdivision agreement.

Consents to severances

The Comay Report proposes (chapter 13) a number of specific changes in the process of granting consents to land severances. For the most part, these changes should be supported. However, the idea (paragraph 13.7) of eliminating provincial part-lot control is an exception. Rather than returning to the pre-1970 system and its problems, it would be preferable to allow a municipality, through the adoption of a planning policy statement, to designate areas where part-lot control should be eliminated, and the minister should remove part-lot control in those areas.(58) In general, part-lot should be removed in most urban areas; in rural areas, however, the disadvantages of reverting to the pre-1970 system would outweigh the advantages.

Distinguishing between urban and rural severance control would be useful. Specifically, the exemptions suggested in paragraph 13.3 seem unnecessarily narrow in urban areas. In addition, municipal councils should also be able to adopt planning policy statements that designate urbanized areas in which land severances are exempted from regulation.

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57 For this reason it is impossible for the provincial government to define "equitable standards for the imposition of financial levies". The province may of course establish constraints on municipal levies. But it is sophistry to presume that such constraints have anything to do with "equity" unless such restrictions are defined in a way that reflects the specific marginal social costs borne by existing residents as a result of a new development.

58 Provincial review and veto powers would permit the province to reject or modify the area designations in such municipal planning policy statements.

8.4 MISCELLANEOUS MATTERS

This section deals with several matters that do not naturally fall in one of the three preceding sections or which apply both to subdivision approvals and to development control problems. These include demolition controls (specifically as they may apply to historical buildings), parkland acquisition, acquisition values, environmental protection, and pipelines and Ontario Hydro facilities.

Demolition control

Under Section 37a of the Planning Act, a municipality may regulate the demolition of residential dwellings in designated areas. A demolition permit may be refused if a building permit has not been issued for a new building on the site, or it may be issued subject to the applicant agreeing to substantially complete a new building within two years of the demolition. Demolition in violation of a demolition control bylaw is punishable by a fine of up to $20,000 per dwelling unit. These demolition control provisions are generally supported, and are not challenged by the Comay Report.(59)

An important issue in some areas is whether municipalities should also have the power to subject historical buildings to demolition control. At present, the Ontario Heritage Act permits municipalities to withhold demolition permits for a period of 270 days for buildings designated as of historical or architectural merit. These provisions, which allow a municipality to delay but not prevent the demolition of designated

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59 The only negative comment received by the Comay committee was by a school board which complained that the exercise of demolition powers by a local council impeded its ability to fulfill its statutory obligation to provide schools where potential school sites were in a residential area. The comment is actually an example of a merit of demolition control, since it illustrates that such control forces conflicting planning interests to be dealt with through negotiation between municipal councils and school boards, rather than being ignored by the special-purpose board.

buildings, are intended to allow negotiations to find a way of preserving the building. The Comay Report notes (paragraph 17.39) that the provisions of Section 37a of the Planning Act would not provide as much effective protection of historical buildings as the delay provided by the Ontario Heritage Act, and therefore recommends against extending Section 37a to include historical buildings.

There is another alternative: namely providing in the Planning Act that municipal councils may enact bylaws under which they may refuse demolition permits for buildings designated under the provisions of the Ontario Heritage Act, provided that the density and uses of a development which could be constructed on the site if the designated building were demolished may be transferred by the owner of the building to another site within a designated area. Under this proposal a municipality could exercise demolition control powers over designated buildings only if it had adopted a bylaw providing for the transfer of development rights within an area.(60) Such municipalities would also have to adopt a planning policy statement providing for the exercise of such powers and specifying the criteria to be applied in determining whether a demolition permit should be issued.

The use of transferable development rights to preserve historical buildings would provide enough incentive for preservation in many cases. However, in some cases the strategic location of a historical building may make a development elsewhere less attractive to the owner. Where the building is of importance to the community, it should be possible for the municipality to ensure that it is preserved. Allowing the municipality to forbid demolition only if it permitted the transfer of development rights would prevent the imposition of undue hardship on the owner.

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60 This would require implementation of the Comay Report's proposal to allow transferable development rights discussed in Section 8.1. This power is meant to supplement the existing provisions of the Ontario Heritage Act, not to be a substitute for them.

Parkland and road requirements

A requirement that 5% of land in a subdivision be conveyed to the municipality for parks purposes is a long-standing feature of current legislation. It has recently been expanded to apply to redevelopment projects through the enactment in 1973 of Section 35b of the Planning Act, which in addition allows municipalities to require park conveyances at a higher rate up to a maximum of one acre for every 120 dwelling units in a development. The Comay Report proposes several desirable minor modifications to existing legislation. It recommends (paragraph 12.50) that the option to require one acre per 120 dwelling units as a condition of subdivision approval be open to the municipality without the enactment of a Section 35b bylaw. It also proposes (paragraph 12.52) that compulsory park dedication in non-residential subdivisions be permitted only pursuant to an adopted planning policy which provides for the acquisition of parks to serve the needs of industrial and commercial employees. And it recommends (paragraph 12.54) that municipalities be empowered to require cash in lieu of parkland, provided that such a requirement is explicitly provided for in adopted planning policy statements.

The Planning Act now authorizes municipalities to obtain land for road widenings as a condition of subdivision approval. While this authority is not questioned, it is worth considering whether the Act should be amended to allow muncipalities to secure cash payments in lieu of land dedications. As noted elsewhere,(61) the flexibility afforded by this option would be useful in permitting a road widening to be located so as to save trees on the border of a property. The Comay Report recommends against this (Item 59, page 171) on the ground that this might allow subdivision developers to be required to pay for road widenings that are not necessary for the development of the land to be subdivided. While this argument raises the

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61 See Bacon et al., *Subject to Approval*, Ontario Economic Council, 1973, 111.

question of levies discussed in the previous section, it would be useful at a minimum to allow locational flexibility. Accordingly, cash payments in lieu of land dedications for road widenings should be permitted where such payments are used to acquire land for the widening of roads adjacent to the borders of a subdivision.

Land acquisition values

In certain circumstances, land may need to be valued for acquisition for public purposes as part of a zoning or subdivision agreement or if cash is to be required from a developer in lieu of the conveyance of parkland. The Comay Report proposes (paragraphs 15.22 and 15.25) that the Planning Act should stipulate how the value of land is to be defined for such purposes. It suggests that the price of land acquired for public purposes as part of a zoning agreement or subdivision agreement be based on its value immediately prior to the adoption of the zoning bylaw or approval of the subdivision agreement, so that the price excludes any increase in value resulting from such actions. On the other hand because the value of land not conveyed to the municipality for parks purposes may be developed as permitted by such action, it proposes that cash payments in lieu of parkland be based on the value of the land immediately subsequent to municipal adoption of the planning action. These proposals are reasonable and should be supported.

Environmental protection

The Comay Report expresses concerns over potential conflicts between procedures specified by the Environmental Assessment Act and others by the Planning Act. It proposes (paragraph 17.24) that the provincial government examine these conflicts with a view to rationalizing the relationship between them and (paragraph 17.26) that the application of the Environmental Assessment Act be confined to matters of the natural

environment, with the definition of "environment" in that Act being refined to exclude social and economic matters that are more properly dealt with as part of general planning. These proposals should be supported.

As noted earlier, the Comay Report recommends (paragraph 6.28) that municipalities be required to have regard for natural environment consideration in developing planning policies. It proposes (paragraph 17.29) that municipal planning policy statements other than those related to public works be specifically excluded from review by the Environment Ministry under the provisions of the Environment Assessment Act. Since this proposal would preclude review of municipal plans by the Environment Ministry on matters pertaining to the natural environment, it should not be adopted. Where conflicts between the Housing and Environment Ministries arise as a result of the different viewpoints from which their review may be undertaken, such conflicts (and implications for modification or veto of municipal plans) should properly be resolved by the cabinet.

Provided that municipal planning policy statements are subject to review by the Environment Ministry, and provided that land use regulatory bylaws are required to be in strict conformity with adopted planning policy statements, there should be little reason for separate environmental assessments of development proposals except in extraordinary situations. The proposals to reduce the direct regulation of private sector undertakings under the Environment Assessment Act made in paragraphs 17.32-34 of the Comay Report should be supported.

Pipelines and Ontario Hydro facilities

The location of intermunicipal pipelines and transmission lines is frequently a highly contentious issue. Under current legislation, the Ontario Energy Board may decide on the location of such facilities, and such decision prevails over local zoning bylaws.

The Comay Report proposes (paragraph 17.42) a slight modification by amending the Ontario Energy Board Act to

require the Ontario Energy Board to consult with every affected municipality concerning a proposed facility before making its decision. This proposal, together with the corollary rejection of municipal control over the location of such facilities, should be supported.

Regarding Ontario Hydro facilities, the Comay Report recommends (paragraph 17.43) that its general proposals (paragraph 4.26) regarding provincial facilities apply to Ontario Hydro as well. This proposal should be supported, subject to the qualification that it should apply only to facilities that are required for the generation and inter-municipal transmission of electricity. Since facilities for the intramunicipal distribution of electricity are clearly a municipal necessity that must be accommodated in municipal plans, there is no reason why their location should not be subject to municipal planning policies.

8.5 DEVELOPMENT STANDARDS

The discussion of development standards in chapter 14 of the Comay Report is difficult to deal with. On the one hand it is clearly desirable to facilitate the achievement of such objectives as "the equitable distribution of social and economic resources". On the other hand, it is difficult to find ways of implementing such praiseworthy objectives that do not violate other objectives of equal importance.

Beyond this, the chapter betrays a commitment to "consistency" for which little justification can be provided. To achieve consistency it is proposed (paragraphs 14.8-14.10) that the Act empower the minister to specify the range of development standards that can be incorporated in a municipality's zoning bylaws and in other development control instruments. As the Report itself notes (paragraph 14.7), "This can be seen as conflicting with our basic proposal for local planning autonomy". This conflict is of fundamental importance.

If zoning bylaws and other regulatory instruments conform

to planning policy statements that are subject to provincial review and veto, and if the province (as under the proposals discussed earlier) had the power to make municipal planning policy statements reflect provincial policies, the provincial government should be able to ensure the achievement of provincial objectives without also imposing supplementary regulations of the means by which municipal planning policies are implemented. Provincial objectives presumably have to do with broad goals such as those reflected in regional housing targets; how such objectives are achieved within a region is not likely to be matters of provincial concern. Consistency in zoning standards is difficult to rationalize as a provincial objective except as a means of maintaining a high degree of provincial intervention in municipal planning decisions while pretending to reduce it.

In implementing its general proposals for provincial intervention through the establishment of development standards, the Comay Report makes three particular proposals aimed at preventing exclusionary zoning. The first (paragraph 14.18) is that the Planning Act should explicitly forbid the use of the zoning power in ways which would prohibit the occupancy of dwellings on any basis other than density. Provided that "density" is interpreted to mean "adults per dwelling unit" and "dwelling units per acre" as well as a floor space density, this proposal would not have significant negative repercussions and should (subject to the proviso) be supported.

The second proposal (paragraph 14.19), an extension of the first and so underlining the importance of the proviso, is that the power to regulate the "character and use" of buildings be deleted from Section 35(1)(4) of the Act or be restricted to the architectural characteristics of buildings and not to their occupancy. This proposal would preclude the regulation but not the prohibition of uses of a building. It would consequently (for example) preclude the regulation of group homes through provisions establishing a minimum spacing for such uses of dwellings. Such regulation may serve useful purposes (such as

replacing an outright prohibition), so that proposal should not be adopted.(62)

The third proposal (paragraph 14.20-3) is that, in regulating development standards, the province should be required to take into account the extent to which given standards will operate to exclude low-income households and the potential cumulative effect of given standards in the achievement of housing policies. Again, it would be more appropriate for these concerns to be considered in provincial review of local planning policy statements than to be used as a rationalization for a uniform set of regulatory standards.

8.6 NORTHERN ONTARIO PLANNING CONTROLS

Special problems exist in part of Northern Ontario which are not included in organized municipalities. At present, land use controls in such areas are implemented through three different regulatory processes, administered by two different ministries. Development permits on crown lands (the predominant part of the unorganized north) are looked after by the Ministry of Natural Resources under provisions of the Public Lands Act. Zoning orders and separation consents are issued by the Ministry of Housing.

In some cases (mostly on the fringes of urban municipalities) planning boards have been established. Ministerial zoning orders must, under Section 32(4) of the Planning Act, conform to provisions of official plans adopted by these planning boards and approved by the Ministry. In addition, delegation of ministerial consent authority to these planning boards or to elected land division committees is authorized in the Act.

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62 The proposal seems to be an overreaction to the 1977 decision of the courts in *Regina* v *Bell*. As noted in the comments above, the proposal would, through reducing municipal ability to control the frequency of certain uses, encourage municipalities to prohibit such uses altogether.

These different controls are evaluated in chapter 16 of the Comay Report. As it notes, there is considerable opportunity for confusion because of the overlapping application of the development permits and zoning orders administered by different ministries. In addition, the lack of local involvement and of a planning base for such controls is unfortunate.

The Comay Report proposes that the jurisdictional problem be settled by designating "permanent settlement areas" which contain or are developing some form of urban structure, with planning controls in such areas exercised by the Ministry of Housing through ministerial zoning orders. Responsibility for development control in all other unorganized territory would be assigned to the Ministry of Natural Resources.

In permanent settlement areas, the Comay Report proposes that elected planning boards should be established responsible for the preparation and adoption of local planning guidelines. Policies based on such guidelines should be subject to ministerial approval. The Report also proposes that a development permit system be established in such areas. Development permits and land severance consents would be granted by these elected boards. Objectors to decisions would have the same rights of appeal to the Ontario Municipal Board as in the case of appeals from decisions of municipal councils in other jurisdictions. In all cases, decisions of such boards should be required to have regard for adopted planning policies.

The Comay proposals are meant to serve as interim arrangements in areas not yet organized as municipalities. As the report notes, a long-term objective should be to establish a municipal government structure in the permanent settlement areas so that there can be more effective control of local planning decisions. The Comay proposals would be effective as an interim arrangement while also rationalizing the current process.

PART THREE

AN ACTION PROGRAM

Thus conscience doth make cowards of us all;
And thus the native hue of resolution
Is sicklied o'er with the pale cast of thought,
And enterprises of great pith and moment
With this regard their currents turn awry,
And lose the name of action.

-- *Shakespeare, Hamlet*

Die Tat ist alles.
[The deed is everything]

-- *Goethe, Faust*

Whether it is conscience or minority government that may dilute political resolution, there is a significant risk that needed reforms of the planning process will not be undertaken. The discussion in the preceding parts of this report is of little interest in itself if no reform takes place.

The purpose of this part is to describe the options faced by the government in deciding upon a reform program, and to propose politically

feasible action. The range of options for choice is described in chapter 9. The key considerations underlying these choices are summarized in chapter 10, which brings together the conclusions reached in this report.

Chapter 9

Options for government choices

Many proposals for reform have been evaluated in previous chapters. Additional proposals have been made on problems not adequately dealt with by the Comay and Robarts reports. All these taken together need to be integrated into a program that is politically possible.

In deciding what to do, the government must decide how far it wishes to go in risking criticism. So far in this report each proposed reform has been discussed in terms of its independent desirability. To decide what political risks to undertake, it is necessary to evaluate which possible reforms are most contentious, whether the benefits of them outweigh associated political risks, and whether they can be modified to make them less controversial. The purpose of this chapter is to address these issues.

The major reforms proposed are classified into three groups, each discussed in turn. Reforms which are relatively non-contentious are summarized in the first section; they constitute a minimal reform program which clearly should be implemented. Contentious or novel proposals are discussed in the next two sections, and a number of possible compromise positions are suggested. On controversial issues compromise is obviously the most likely choice, and it becomes important to define compromises that retain as many of the crucial and desirable features of reform as possible while reducing political risks.

9.1 A MINIMAL REFORM PROGRAM

Several improvements to the municipal planning system are relatively non-contentious and would increase the efficiency of

the system. These include a number of "housekeeping" changes described in Part 3 of the Comay Report, many of which would simply codify current practice.(1) More important changes include the following:

- ¶ Clearly specified citizen rights: The recommendations in chapter 9 of the Comay Report would entrench safeguards now traditional in many municipalities. They also define rights of unincorporated associations to participate on behalf of citizens in municipal hearings and in presenting objections. Some minor modifications of these proposals have been suggested in Section 6.3, but with or without these modifications the Comay proposals on rights of participation should be implemented. Rights of notice should also be extended to all municipalities potentially affected by a planning action.

- ¶ Requiring adoption of planning policy statements prior to undertaking any planning actions: Two inter-related proposals in the Comay Report--making the adoption of planning policy statements a prerequisite for the exercise of regulatory powers and allowing such statements to be adopted on an ad hoc basis--have widespread implications for the entire regulatory process. Though other Comay proposals regarding official plans are contentious, these two are not. They would make the planning system more uniform and more understandable. The greater flexibility provided by allowing municipalities to adopt planning policy statements in the absence of a comprehensive official plan is highly desirable.

- ¶ Eliminating inconsistencies in the relationship of official plans to municipal and provincial actions: A number of reforms (some of them proposed by the Comay Report) have been suggested in Section 6.2. They include the Comay proposals for making most provincial crown rights subject to the jurisdiction of municipal planning, making OMB regulatory decisions subject to the conformity requirements in Section 19(1) of the Act, and requiring previously adopted zoning and development control bylaws to be brought into conformity with newly adopted planning policy statements. These reforms would eliminate anomalies that can cause substantial public misunderstanding.

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1 Certain of these "housekeeping" reforms should be modified however. The period of time for council decisions referred to in items 15 and 70 should be sixty days, not forty-five days, for reasons discussed earlier (see Section 6.2 and 8.2). As noted there, the Robarts proposal (recommendation 11.7) is in any case preferable. The submission referred to in Item 59 should be acted on, contrary to the Comay Report's recommendation, but should be made subject to the qualification described in Section 8.4.

¶ Clarifying delegation to special-purpose bodies: The Comay and Robarts reports both propose changes that would ensure that local councils are fully reponsible for delegated decisions. With some important provisos (noted in Section 6.3) the Comay and Robarts proposals should be supported.(2)

¶ Reducing frivolous appeals to the Municipal Board: While most proposed changes in the role of the OMB are highly contentious, this does not apply to the problems created by objections with no basis. The Comay Report proposes that all objectors should be required to file written reasons for their objections. In addition, the Board should be empowered to decide on the basis of the written reasons whether to grant a hearing.

¶ Requiring reasons for all provincial rejection or modification of municipal actions: The form and extent of provincial intervention is arguable. However, the Comay proposal (paragraph 4.8) for it to be mandatory for the minister or cabinet to state the reasons for any decision to reject or modify a municipal planning action should be adopted under any circumstances.

¶ Allowing provincial modification of previously-adopted municipal plans: The reserve power proposed in paragraph 4.11 of the Comay report should be applicable to previously adopted municipal planning policies as well as to newly adopted ones. In addition, section 32(4) of the Act should be repealed.

¶ Clarifying the regional planning role of counties and upper-tier municipalities: The scope and function of upper-tier regional planning should be defined in the Planning Act; responsibility for detailed land use planning should be clearly assigned to local (lower-tier) municipalities. The Comay and Robarts proposals to this end (described in Section 7.2) differ in some respects. The choice among the different options is of secondary importance compared to the importance of adopting one of them.

¶ Controlling the use of holding bylaws: The Comay Report's proposals for formal definitions of holding bylaws and interim control bylaws would both limit their use and

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2 The most important qualifications concern proposals for making the existence of planning boards a matter for local option. This proposal is of debatable merit, and in any case should not be done unless the legislation provides two safeguards: (1) a requirement for preliminary hearings (now provided by planning boards) prior to the submission of recommendations on planning policy statements to a municipal council, and (2) a requirement that the role, function, and procedures of special-purpose bodies be specified in a municipal planning policy statement.

differentiate them from "normal" zoning bylaws. These proposals should be adopted. In addition, the role of other rezonings should be recognized in the Planning Act which should state requirements (described in Section 8.1) to be applied to planning policy statements that are implemented through rezonings not involving the repeal of a holding bylaw.

¶ Making development review more efficient: With some qualifications (noted in Sections 8.1 and 8.2) the Comay proposals on development review should be adopted.

¶ Providing additional zoning techniques: The Comay Report's recommendations for formal authorization of additional zoning tools for general use would provide greater flexibility in regulation and increase regulatory efficiency. These tools include bonus zoning, zoning agreements, and temporary use zoning. With minor qualifications the Comay proposals should be implemented.

¶ Improving subdivision controls and severances: A number of procedural improvements are proposed by the Comay Report; they assign a clearer responsibility to municipalities and expedite the process. With the exception of the proposal to eliminate provincial part-lot control in rural areas, they should be adopted. However, the Comay proposals to limit conditions for subdivision approval would have unintended effects and should not be adopted.

Taken together, the foregoing proposals would significantly improve the efficiency of the planning process. They would not materially change the role of the province or the OMB and would hence not have much effect on municipal accountability. In addition, they would not change the role of official plans in the planning system, neither lessening their role (as proposed by Comay) nor enhancing it (as proposed in chapter 4). Nevertheless, they would improve the technical functioning of the process, increase its flexibility, provide new regulatory tools to permit the elimination of existing misuse of rezonings, and make the planning system more comprehensible. These are worthwhile aims of any reform program; the foregoing proposals are a respectable package.

9.2 MORE CONTENTIOUS PROPOSALS

While the minimum reform package just described would improve the functioning of the planning system, it would not address the more fundamental concerns about municipal accountability and predictability prominent in criticisms of the existing system. Nor would it ameliorate the conflicts between governments which have been central to the difficulties of making regional governments work. As a result, the minimum reform package would be a disappointing outcome to the long series of studies which have culminated in the Comay and Robarts reports.

More significant reform proposals that deal with the fundamental issues will inevitably be controversial. While some of the contentious aspects of the most significant proposals made in the Comay and Robarts reports can be eliminated by enhancing quasi-institutional safeguards of minority interests--the subject of the next section--the remaining sources of dispute must be recognized. The difficult proposals have to do with limiting the role of the OMB and restricting provincial intervention. The Comay proposals to "delegalize" official plans are also contentious, partly because they go in the wrong direction.

The status of official plans

This issue will be dealt with first, in order to eliminate it. The Comay Report's proposals to remove the legal status of official plans ignore the fundamental role played by planning policy statements precisely because of their legal status. It would significantly reduce the predictability of land use regulation, and would unnecessarily cause uncertainty for residents and disincentives for investors.

Nevertheless, the present requirements for conformity to official plans are unnecessarily broad and would be relaxed by modifying the conformity requirements as they apply to matters other than land use regulation. This would mean replacing

Section 19(1) of the Planning Act by provisions which would impose the following conditions:(3)

- Municipal planning actions affecting the regulation of land use should conform strictly to adopted planning policy statements and should not be permitted unless authorized by a previously adopted planning policy statement.

- Local public works should only be required to have regard for adopted planning policy statements. However, two additional requirements should apply to proposed local public works which do not conform to adopted planning policies: public notice of the proposed public work should be provided and any planning policies potentially affected by it should be reviewed. In addition, non-conformity should be allowed as a ground for citizen objections to a public work financed by capital funds; such objections should be heard by the OMB.

- Public works undertaken by a regional (upper-tier) government should be specified in and conform to adopted regional planning policy statements. However, it should be provided that the phasing, relative priority, and specific as opposed to generalized location of such works need only have regard for such policies. Objections by local municipalities to capital projects undertaken by a regional municipality should continue to be heard by the OMB.

- The provision of municipal services should only be required to have regard for adopted planning policy statements. Moreover, there should be no requirement for prior planning justification for such services.

These proposed requirements represent a reasonable compromise between the desire for flexibility emphasized by the Comay Report and the importance of predictability for affected parties. They confine the conformity requirements to where they are critically needed and allow some flexibility where most desired.

In addition, two proposals have been made in Section 6.2 for additional flexibility in the way in which official plan policies may be implemented in land use regulations. These proposals would authorize municipalities to adopt planning

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3 These requirements summarize the separate discussions in Sections 5.2, 6.2, and 7.2.

policy statements that permit deviations from strict conformity with quantitative limits specified in such policies or that allow expedited processing of site-specific plan amendments. They would thus permit municipalities to opt for more flexible interpretations of the conformity requirements in situations where such flexibility may be appropriate.

These proposals, taken as a package, would meet most of the criticisms of the Comay proposals for delegalizing official plans; at the same time they would respond to the concerns underlying the Comay proposals. Nevertheless, though this package would be preferable to no change, the current definition would be preferable to the Comay proposals. Preserving the requirement that land use regulation conform to adopted planning policies is of the highest importance.

The role of the OMB

The most contentious proposals made by the Comay and Robarts reports concern the role of the Ontario Municipal Board. Their proposals to reduce the Board's function attracted substantial criticism, which was merited in that both reports understate the importance of the protections furnished by the current role of the OMB. While increasing municipal accountability is a high-priority objective, it cannot be given total primacy over the protection of individual rights and minority interests, for the reasons discussed in chapter 3. Moreover, it is not sufficient to regard such protection as a matter of ensuring adherence to rules of "natural justice", since it is substantive fairness rather than procedural justice which is of concern to most citizens. The way the OMB functions is rightly subject to substantial criticism. Nevertheless, right or wrongly, the Board is widely regarded as an important protector of substantive fairness in planning decisions.

The proposals in the two reports to limit the grounds for objection to the Municipal Board are unacceptable, for reasons presented in Section 6.4. The Robarts proposal is far too

extreme; the Comay proposal would be difficult to implement. Nevertheless, the distinction between types of appeals introduced by the Comay proposals is a useful basis for clarifying the role of the OMB, since such distinctions may be used by the Board as the basis for directing its findings.

The key issue is of course the extent to which the OMB has final decision-making authority. On this issue, a range of possible decisions may be envisaged. At a minimum, the Board should be precluded from initiating changes in planning policy. This implies that at least the following reforms should be implemented.(4)

- ¶ Sections 17(3-5) of the Planning Act should be modified to ensure that no planning policy statement may be adopted or amended except on the initiative of a municipal council.

- ¶ Citizens should be allowed to initiate an OMB hearing on the question of whether consideration of a request for an official plan amendment is being unduly delayed, with the Board empowered to fix a deadline for a municipal decision on the proposal.

- ¶ Citizens should also be able to object to a municipal decision against changing existing planning policy statements on the grounds that the council did not follow proper procedures or that advice or information provided to the municipal council during its review was incorrect or incomplete, with the OMB empowered on hearing the objection to direct the municipal council to reconsider the issue.

These changes would make it clear that planning policies cannot be altered without a municipal council's approval and would eliminate the present uncertainty introduced by the possibility of an OMB decision on applications never heard by the municipal council. At a minimum, a local council should be accountable for initiating an official plan amendment.

Whether the same prohibition should be applied against OMB initiation of a rezoning permitted by adopted planning policy statements is more debatable, because of a presumption that an

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4 These changes are discussed in Section 6.2, along with other issues concerning the review of planning policies.

application conforming to specified rezoning criteria should be favourably considered by a municipal council. This matter is discussed in Section 8.2, where it is concluded that the OMB should not be empowered to grant a rezoning application rejected by a municipal council. However, the Board should be able in such cases to advise the municipality that an application appears to conform to stated rezoning criteria and to direct the municipality either to approve the rezoning or to amend the policy statements so that the reason for rejecting the application is clear.(5)

Eliminating (or at least curtailing) the initiating powers of the Municipal Board now provided by Sections 17(3-5) and 35(22) of the Planning Act would go far to reduce the Board's powers to take decisions out of the hands of municipal councils. If no other aspect of the Board's decision-making powers were changed, the Board would continue to function as at present in hearing objections to planning actions approved by councils. One compromise position would therefore be to repeal Sections 17(3-5) and 35(22), replacing them with the provisions suggested above, and to make no other changes in the role of the Board. This would eliminate the most blatant ways in which municipal authority can be supplanted by the Board but without affecting its role in protecting citizens from actions arbitrarily approved by a municipal council.

To go beyond this first compromise position is highly desirable. In hearing objections to planning actions approved by councils, the OMB is currently assigned complete decision-making powers, including the ability to modify bylaws, subject only to appeal to the cabinet. The recommendations made earlier (in Sections 4.3, 6.4, and 8.2) would reduce the Board's role to one of making recommendations to municipal

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5 While these are the conclusions reached in this report, the government may decide to give more weight to the presumption that a conforming project should be approved. If so, then the option described in chapter 8, note 37, would be appropriate, namely, that the Board's findings and recommendations first be returned to the municipal council, with an appeal to the cabinet from the municipality's decision.

councils, with objectors having the right to appeal the matter to the cabinet where the municipal council does not seriously reconsider the matter in the light of the Board's findings. This right of further appeal would put the onus on the municipality to show by its actions that it gave serious regard to the OMB recommendations.

If it is decided that going this far is not appropriate, the present system should at least be modified to make municipalities accountable for accepting OMB decisions. The most critical element of the recommendations concerning the OMB in this report is that the Board should not have the power to modify municipal bylaws without such modifications being approved by the municipal council. Accordingly, even if the government decides to continue the OMB in its present role, it should ensure that the current process is changed to permit municipal review of Board-initiated modifications. These objectives would be achieved by the following reforms:

- Where a municipal planning action is modified by the OMB, the matter should be returned to the municipal council for its consideration of the modification. The municipal council should be empowered to approve or reject the Board's decision and required to do so within sixty days of the Board's decision.(6)

- Where the municipality rejects the Board's decision any bylaws implementing the planning action should be voided.

- Where the municipality accepts the Board's decision or where the Board approves the planning action without modifications, objectors to the original planning action should have the right to appeal the Board's decision to the provincial cabinet, as at present.

- A municipality should continue, as at present, to be able to appeal the Board's decision to the cabinet. Where the municipality is appealing a modification of its original action and the cabinet does not decide in favour of the municipality, the deadline for municipal rejection of the modified bylaw should be sixty days following the cabinet's decision.

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6 The sixty-day period would be required to allow sufficient time for citizen participation in the necessary reconsideration of the matter. Where a council takes no action within the sixty-day period, the Board decision should be deemed to have been approved.

These proposals would leave the decision-making powers of the Municipal Board as they now exist, except for permitting a municipality to reject a Board modification. The Board would continue to be able to veto a municipal decision or to attach conditions to its approval.

The foregoing proposals also represent a compromise in not going as far as the recommendations made in earlier chapters of this report. Nevertheless, they would build in some of the protections of municipal accountability motivating those recommendations. The most important feature of the present system reducing municipal accountability is the fact that municipalities are able to avoid all responsibility for modifications decided by the Board, and so can duck contentious planning issues by making a popular but inappropriate decision in full knowledge that it will be changed by the Board. This irresponsibility would not be possible under the above proposals.

It would of course be better to implement the proposals made in earlier chapters. In addition to restricting the OMB's function to hearing and recommending, these recommendations would bring a number of procedural improvements:

- The Board's present responsibility for evaluating the general merit of a municipal decision referred to it as well as the matters raised by objectors should be eliminated. The Board should be redefined as an appellate agency, so that the onus would be on objectors to show that their objection has merit.

- Criteria guiding the Board's consideration of objectives should be stated in the Act; in addition, the procedures followed after an OMB decision should depend on the nature of the Board's findings.

- The introduction of new evidence not previously submitted to the municipal council should, if material, cause the decision to be referred back to the municipal council for reconsideration.

These additional proposals should be implemented even if the Board's decision-making powers are retained in their present form.

The role of the cabinet

Though the Ontario Municipal Board plays a central role in the adjudication of planning disputes, it is not the final arbiter in the present system. This role is reserved for the cabinet.

If the role of the Board is changed to limit its power to impose planning decisions over the objections of municipal councils, the role of the cabinet will be affected. OMB decisions could continue to be appealed to the cabinet, and changed by them. However, since any modifications of the original municipal decision made by the OMB or cabinet would have to be accepted by the municipal council, the cabinet's current power to make municipal planning decisions would be reduced. The cabinet would be able to veto municipal planning actions either directly or through making modifications which are unacceptable to the municipal council. But it would not be able to impose its views as to how a planning dispute might be resolved.

The effect of this change would be to make the role of the cabinet essentially as proposed in Section 4.3. To protect minority interests and individual rights, it should have the power to block unreasonable municipal actions. But the cabinet should not be able to substitute its discretion for municipal judgement unless the decision is acceptable to the municipality. To ensure municipal accountability, a municipal council should have the power to reject a planning action that has been modified by the province.(7)

If the role of the OMB is not changed, it will be difficult to reduce the role of the cabinet. Nevertheless, the procedural improvements recommended in paragraph 10.43 of the Comay Report should be implemented in any case, with the cabinet being required to state its reasons for decisions.

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7 It should be emphasized that this applies only to provincial modifications made in response to appeals against municipal decisions. (Provincial intervention to achieve provincial planning objectives is discussed below.) This proposal differs somewhat from that presented in Section 4.3 in order to be consistent with the compromise position suggested above regarding the role of the OMB.

Other provincial intervention

The need for provincial intervention to secure provincial planning interests is generally recognized, and the form of intervention for this purpose is not as controversial a matter as it is for citizen appeals and the role of the Ontario Municipal Board. Nevertheless, concerns have been raised over the effects of removing the "quality control" provided by the current requirements for provincial approval of municipal planning policies. The Comay and Robarts reports both propose that these conditions be replaced by a provincial veto of municipal planning actions which conflict with defined provincial interests; this proposal is supported above in Section 6.5.

To some extent, concern over the form of provincial intervention is misdirected. A number of aspects of "quality" may appropriately be defined as matters of provincial interest, whether to encourage consistency in practice across the province or to discourage practices that may have undesirable effects on the provincial economy. Any provincial intervention, whether desirable or not, may be accomplished with virtually equal ease through the existing approval process or through the proposed veto process. Moreover, the administrative implications of either process are indistinguishable, since in both cases the same provincial review is required. Some of the significant procedural changes proposed by the Comay and Robarts reports (such as the Robarts proposal for a fixed deadline for provincial intervention or the Comay proposal that intervention be only to secure fulfilment of defined provincial interests) could as well be implemented in a process of formal approval as in the proposed veto process.

Nevertheless, the proposed change in the form of provincial intervention has an important intangible implication, namely, that such intervention should not substitute provincial for municipal decision-making on purely local matters, and any provincial intervention should therefore be demonstrably justified. The recommendation that such justification must be

stated in the form of written reasons for a provincial decision to intervene is, from this viewpoint, the most important proposal made by the two reports, and it should be adopted regardless of the form of the intervention process. It would be easier to implement this in the context of a veto process, but it could also be accomplished in the present approval process.

It is clearly desirable that provincial intervention not go beyond formally defined provincial interests. While this restriction may be achieved in a variety of ways, the recommendations discussed in Section 6.5 have the advantage of clarity over others that have been evaluated without in any way limiting provincial intervention where that is desirable.

New regulatory powers

For the most part, the proposed changes in regulatory instruments included in the minimal reform package described in Section 9.1 are designed to reflect current practice and to improve the way in which these instruments are used. The proposals for clear definition of holding bylaws and interim control bylaws, as an example, would not increase existing municipal regulatory powers but would clarify how they should be used. Though the use of these powers is often controversial, the proposed definitional improvements would be beneficial and less contentious than any major change in such powers.

The proposals made in chapter 8 for additional regulatory powers would obviously be more controversial. The proposed regulatory instruments include:

- Transferable development rights. To implement this, it would be necessary to provide for the registration against land title of development rights that might be severed and transferred to others, and to specify limits on the density that may be transferred to recipient sites. As noted by the Comay Report, authorizing municipalities to allow the transfer of development rights would enable a number of local planning objectives to be achieved more easily, with less cost to private developers.

- Extended demolition control powers for historical buildings. Controls protecting historic buildings are much weaker in Ontario than in many comparable jurisdictions, and there is clearly a need to strengthen them. On the other hand, intervention to this end is controversial. Providing municipalities with the power to forbid the demolition of historic buildings on sites on which development rights may be transferred elsewhere by the owner, as proposed in Section 8.4, would allow municipalities to protect such buildings without imposing undue loss on their owners.

- Controlling the aggregate amount of growth in an area. This would require a new regulatory instrument (the development licenses proposed in Section 8.1) in order to implement this type of control. Providing this power would allow such control to be implemented directly, rather than in less efficient indirect ways as is done currently.

Of these, the first is least controversial. It would have highly beneficial effects through permitting municipal planning objectives for particular sites to be realized with less cost. The other two would be widely regarded as implying more municipal intervention in the market.

Nevertheless, all these proposed instruments should be considered. In doing so, the value of providing tools that would directly implement regulatory objectives should not be understated. Such objectives will often be pursued through indirect means if they can not be implemented directly, and such indirect regulation can have significantly higher social costs.

9.3 INCREASING SAFEGUARDS

The Comay and Robarts reports pay surprisingly little attention to ways in which existing checks and balances in the system can be enhanced to provide better protection of individual rights and minority interests. In part, this may reflect the fact that existing checks and balances work in subtle ways and are difficult to appreciate. Nevertheless, they are rightfully viewed as important by participants in the

process, and the subtlety of their origins is one reason underlying concern that the proposed reforms may undermine existing protections. To be sure that reforms do result in an improvement, it is important to face these concerns directly by incorporating sufficient safeguards into the system. Safeguards are of particular importance if the reforms aim to remove some of the features which prolong conflict and increase uncertainty. The ways in which the system can be most easily improved all utilize the hierarchical relationship between planning policies and regulatory decisions implied by the strict conformity requirements discussed in the preceding section. The safeguards include enhancing the role of both local and regional official plans.

Safeguards in adopting official plans

A number of ways in which the conditions of adoption of planning policy statements may be made more stringent have been proposed in earlier chapters of this report.(8) Making it more difficult to adopt changes in planning policies would ensure that changes are not made lightly or arbitrarily without an opportunity for effective public participation. These proposals also reflect the view that, even from a pure efficiency viewpoint, it is on average faster in the long run to try to engender a compromise settlement through delaying initial adoption than to "expedite" a municipal decision to which affected interests will object at length.

As with other reform proposals, there are a number of possible choices which the governments can make. The following would not introduce new costs or delays:

¶ In adopting or amending planning policy statements, more public hearings should be required than when adopting an implementing bylaw. Municipalities should therefore be required to hold preliminary public hearings on policy proposals before final recommendations are submitted to the council; a second public hearing should be held by the council on the recommendations before deciding the matter.

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8 See especially Sections 4.2 and 4.4.

The preliminary hearing (which would normally be delegated to planning boards) should not be mandatory for implementing bylaws.

¶ An absolute majority of all members of council should be required for the adoption of planning policy statements. By contrast, a majority of those present would be all that would be necessary for the adoption of an implementing bylaw, as at present.

Precedent exists for both of these proposals. The requirement for preliminary hearings simply reflects the procedure now followed in municipalities with planning boards. The requirements for an absolute majority now applies to planning boards (though not to municipal councils). Accordingly, since the proposals do little more than codify existing practice, they should be regarded as minimal (though very important) safeguards.

Beyond this, it would be desirable to introduce additional safeguards for minority interests. A number of these have been proposed in Section 4.2. They could be implemented in a variety of combinations; the following two safeguards would perhaps be the most acceptable.(9)

¶ A three-fifths majority of all members of council could be required to confirm the adoption or amendment of a planning policy statement to which formal objections are made by more than twenty individual residents or owners of property located in close proximity to the affected area.

¶ Where an extraordinary majority of council is required to confirm the adoption or amendment of a planning policy statement, and additional public hearing should be stipulated and should be held by the full council.(10)

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9 These proposals deliberately differ in some particulars from those made in Section 4.2 to emphasize that there may be well-founded arguments for differing ways of implementing the proposals, but that these are of secondary importance.

10 It is assumed that a council would normally delegate responsibility for hearings to a committee of council and responsibility for preliminary hearings on proposed planning policies to a citizens' planning board. The foregoing proposal, compelling the full council to hold a public hearing only where there are significant objections to a policy adopted by council, would thus be less onerous than that made in Section 4.2 recommending a public hearing by full council before the adoption of any planning policy statement.

These proposals would force policy decisions of a controversial nature to be made more deliberately and would encourage political compromise, the importance of which should not be understated.

Forcing compromise in intermunicipal disputes

Intermunicipal planning disputes are currently resolved by provincial intervention, and the Comay and Robarts reports both recommend that this practice continue. Such intervention has on the whole been effective. However, it would be better to encourage more negotiation and less adjudication, particularly since consistent resort to provincial arbitration inevitably moves responsibility away from the municipal councils which should be held accountable. Creating regional governments, by institutionalizing intermunicipal conflict (in this case between upper-tier and lower-tier municipalities), has made provincial arbitration more often sought. Requiring that regional official plans be adopted by the upper-tier municipality forces conflict to the surface, and over the next decade will increase the demand for provincial arbitration.

It is easiest to encourage the resolution of intermunicipal conflicts by the affected municipalities themselves in those cases where they occur most frequently, namely, in disputes between regional and local municipalities. Enhancing the role of regional official plans would help focus such disputes on the adoption and approval of planning policy statements. As proposed earlier, the process of adopting regional planning policy statements could be modified to encourage political negotiation and compromise at the municipal level. The role played by local municipalities in representing regional minorities should be recognized by allowing them to force an extraordinary majority to be required in a regional council's adoption of regional planning policy statement. As suggested in Section 4.4, this can perhaps best be done by requiring a regional council to confirm provisions of a regional planning policy statement by an extraordinary majority

(say a three-fifths majority) when a local municipality has objected to them by vote of a corresponding majority of the local council.

This proposal would undoubtedly make the adoption of regional planning policy statements more difficult. However, the process of negotiating an agreement on regional planning policies would not differ in kind from what now occurs informally. The main difference would simply be that no local municipality could easily be excluded from such negotiations through the formation of a coalition of representatives of other municipalities. Increasing the blocking power of a municipality would encourage compromises that reflect important minority views.

Chapter 10

Conclusions

The municipal planning system in Ontario is in sore need of reform. It is marked by confusion, a lack of clarity, inconsistent procedures, and unnecessary delays and costs. All these are products of a system which, though working well in many respects, badly needs to be rationalized.

The necessarily complex nature of the land use planning process makes reform difficult. If some aspect of the regulatory process was causing delays and other costs with no possible offsetting benefits, it could of course be easily eliminated. The problem in rationalizing the municipal planning system is to discern how to modify the system so as to preserve and enhance its desirable features while at the same time reducing delays and costs.

The first part of this report described at length the reasons for the complexity of the planning system. It pinpointed a number of goals which must be achieved by any reform program:

- Certainty: Both for neighbours and property developers, uncertainty of regulation is costly. Existing features which inhibit regulatory change enhance certainty through increasing the costs of change. Finding efficient ways of reducing uncertainty should be a key objective of reform.

- Flexibility: The social needs served by land use regulation are numerous and not uniform. Allowing a variety of objectives in regulation is essential; additional regulatory instruments enabling these objectives to be more directly achieved will reduce "misuse" of existing instruments to achieve purposes for which they were not designed.

- Protecting minority interests: Particularly in a region large enough to be organized as a two-tier regional government, local minorities must be protected by mechanisms that force their views to be taken into account.

- ¶ Protecting individual rights: Planning decisions can imply significant redistribution of wealth and must be restricted to cases where the social benefit justifies the cost borne by individuals. Individual rights must be protected and the individual costs of implementing policy changes reduced by such methods as transferable density rights.

- ¶ Effective citizen participation: An over-formalized, complicated process restricts citizen participation to those who can overcome the barriers. Attention must be paid to making the system more understandable and more open.

- ¶ Encouraging political compromise: The dynamics of conflict must be recognized as central to the process. Encouraging the negotiation of stable solutions is of high importance.

Stated in summary form, these goals may seem indisputable, but they are not easy to achieve.

Increasing municipal accountability, a primary objective of both the Comay and Robarts reports, would be desirable and would also help to make the process clearer. However, increased accountability must not be sought at the expense of other reform goals.

Strangely, the Comay and Robarts reports understate the importance of conflicts between municipal accountability and other reform objectives and do not appreciate the usefulness of quasi-constitutional safeguards in reducing this conflict. Apart from this serious oversight, both reports are of great value, containing important insights and many excellent proposals. However, their neglecting problems entailed by increasing municipal accountability makes their package of reforms unbalanced and too risky to implement without modification.

Finding ways to correct this oversight has been one of the objectives of this report. It has suggested a number of safeguards that would eliminate the risks inherent in the Comay and Robarts proposals. This report argues that is possible to design a reform program which would at the same time increase both municipal accountability and the extent to which all other reform objectives are achieved.

Such a reform program is described in chapter 9. As noted there, a number of compromises are possible, and the major reforms described could be implemented in a phased program. Nevertheless, by doing the utmost to implant safeguards through enhancing the role of planning policy statements, the risks associated with other changes can be reduced.

The municipal planning process can be substantially improved. Much time and much effort has been expended on analysis of possible reforms over the twelve years since the Ontario Law Reform Commission first examined the subject. All this analysis has refined the many proposals for reform to a point where potential benefits have been maximized and risks minimized. It is now time for the government to act.

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